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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 212.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, OF THE CITY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

BARTHOLOMEW FOLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED JULY 11, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 212.

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INDEX.

	Original.	Print.
Caption	*a*	1
Complaint	2	1
Exhibit A (insurance policy)	6	3
B (additional insurance)	13	5
C (additional insurance)	14	5
Summons	16	6
Notice of appearance for defendant	18	7
Notice of motion for removal of cause	20	8
Petition for removal of cause	21	8
Bond for removal of cause	25	10
Order for removal of cause	29	12
Answer	31	12
Jury	37	15
Instructions prayed by plaintiff	38	15
Instructions prayed by defendant	41	16
Charge to jury	44	18
Verdict	46	18
Bill of exceptions	47	18
Order allowing writ of error	62	24
Judgment	64	25
Bond	66	25
Writ of error	70	27
Clerk's certificate	73	28

a UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In circuit court.

BARTHOLEMEW FOLEY, A CITIZEN OF THE State of South Carolina, plaintiff,
against
THE KNICKERBOCKER LIFE INSURANCE Company, of the city of New York, a corporation created by the State of New York, defendants.

Appeal from the circuit court of the United States for the district of South Carolina to the Supreme Court of the United States.

1 THE UNITED STATES OF AMERICA,
District of South Carolina, to wit:

No. 1.—At a circuit court of the United States for the district of South Carolina, begun and holden at Columbia, in the district aforesaid, on the fourth Monday in November, 1878, before the honorable Hugh L. Bond and the honorable George S. Bryan, judges of the United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

BARTHOLEMEW FOLEY, A CITIZEN OF THE State of South Carolina, plaintiff,
against
THE KNICKERBOCKER LIFE INSURANCE Company, of the city of New York, a corporation created by the State of New York, defendants.

Be it remembered that heretofore, to wit, the 16th day of
2 March, in the year of our Lord one thousand eight hundred and seventy-eight, the said Bartholemew Foley impleaded the said The Knickerbocker Life Insurance Company in a complaint and summons for money demand; which complaint and summons are in the words and tenor following:

No. 2.—*Complaint.*

STATE OF SOUTH CAROLINA,
County of Charleston:

In the court of common pleas.

BARTHOLEMEW FOLEY, PLAINTIFF,
against
THE KNICKERBOCKER LIFE INSURANCE Company, of the city of New York, defendants. } Complaint on life insurance policy.

The plaintiff herein, complaining of the defendant, alleges:
I. For a first cause of action, first:
1. That the defendants are a corporation duly created by and under the laws of the State of New York.

2. That on the sixth day of January, A. D. 1872, in consideration of the payment by the plaintiff to the defendants of the sum of one
3 hundred and forty-five and $\frac{75}{100}$ dollars, and of the annual premium of a like sum to be paid on or before the 6th day of January in every year during the continuance of the policy hereinafter mentioned, the defendants by their agents, duly authorized thereto, made and delivered to the plaintiff their policy of insurance upon the life of H. H. Badenhop, of Charleston, in the State of South Carolina, and thereby insured the life of the said H. H. Badenhop in the sum of five thousand dollars for the benefit of the plaintiff, and promised and agreed to pay the said sum insured to the plaintiff within three months after due notice and proof of death of the said H. H. Badenhop, a copy of which policy of insurance is hereto annexed as a part of this complaint and marked Exhibit A.

3. That the plaintiff was then and is now a creditor of the said H. H. Badenhop to the amount of five thousand three hundred dollars, and as such had a valuable interest in the life of the said H. H. Badenhop.

4. That thereafter, on the 20th day of May, A. D. 1873, the said defendant, in consideration of the profits realized upon premiums
4 received on said policy prior to said date, assured the life of the said H. H. Badenhop, insured as aforesaid, for the further amount of thirty-six $\frac{03}{100}$ dollars for the benefit of the plaintiff, which said additional insurance was subject to the conditions, restrictions, and provisions of the said original policy, and payable upon the termination of said policy by death or maturity, a copy of which said additional insurance is hereto attached marked Exhibit B.

5. That thereafter, on the 22nd day of June, A. D. 1874, the said defendant in consideration of a certain sum apportioned (as profits on premiums paid) to the plaintiff as holder of said policy of insurance, further insured the life of the said H. H. Badenhop for the further sum of thirty-nine and $\frac{36}{100}$ dollars for the benefit of the plaintiff, which said additional insurance was subject to the restrictions and provisions of the said original policy, and payable when the campany, the defendants aforesaid, should become liable to pay the amount of said original policy, a copy of which said additional insurance is hereto attached marked Exhibit C.

6. That on the 11th day of January, A. D. 1875, at Chicago, in
5 Cooks County, in the State of Illinois, the said H. H. Badenhop died, which death was not caused by reason of any of the causes excepted in the said policy of insurance.

7. That the said H. H. Badenhop and the plaintiff each duly fulfilled all the conditions of said issuance on their part, and more than three months have elapsed since notice and proof of death has been furnished to the said defendants.

8. That no part of the said sums has been paid, and there is now due on the said original policy of insurance and the additional contracts of insurance thereunder, as aforesaid, the sum of five thousand and seventy-five and $\frac{39}{100}$ dollars, with legal interest thereon from the 11th day of September, A. D. 1877.

II. Second. For a second cause of action the plaintiff alleges:

That after the death of the said H. H. Badenhop, on the 11th day of January, A. D. 1875, as aforesaid, and after the termination of the said original policy of insurance by the death aforesaid, the plaintiff, not knowing of the said death, paid to the defendants, on the 6th day of January, A. D. 1876, the annual premium on said policy of insurance, to wit, the sum of one hundred and forty-five and $\frac{75}{100}$ dollars,

6 which said sum the plaintiff is entitled to recover back from the defendants in the premises.

Wherefore the plaintiff demands judgment: 1st. For the sum of five thousand two hundred and twenty-one and $\frac{14}{100}$ dollars, together with legal interest on the sum of five thousand and seventy-five and $\frac{39}{100}$ dollars from the 11th day of September, A. D. 1877, and legal interest on the sum of one hundred and forty-five and $\frac{75}{100}$ dollars from the date thereof, and for the costs of this action.

February 19th, 1878.

BRYAN AND BRYAN,
Plaintiff's Attorneys.

STATE OF SOUTH CAROLINA,
County of Charleston:

Bartholemew Foley, the plaintiff above named, being duly sworn, says that the foregoing complaint is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

BARTHOLEMEW FOLEY.

Sworn to before me this 18th day of February, A. D. 1878.
[SEAL.] GEO. S. HOLMES,
Notary Public.

No. 3.—EXHIBIT A.

7 No. 50302.] [Age, 38.

Premium, $145.75.] [Insurance, $5,000.

This policy of insurance witnesseth that the Knickerbocker Life Insurance Company, of the city of New York, in consideration of the premium of one hundred and forty-five dollars and seventy-five cents, to them in hand paid by Bartholemew Foley, and of the annual premium of a like sum to be paid on or before the sixth day of January in every year during the continuance of this policy, do assure the life of H. H. Badenhop, of Charleston, in the State of South Carolina, in the amount of five thousand dollars, for the term of his natural life, for the benefit of Bartholemew Foley, his creditor.

The premiums on this policy are payable in cash.

Provided, however, that in case a loan of a portion of said premium shall be made on this policy the same shall be subject to all of the terms and conditions expressed in the obligation or acknowledgement given upon such loan and to the payment of interest thereon in advance, and such loan shall be a just counter-claim against any
8 amount which may become payable on this policy, and shall be deducted therefrom.

It being understood and agreed that if, after the receipt by this company of not less than three annual premiums, this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same within thirty (30) days after such unpaid premium shall have been due, the company will in exchange upon the payment in cash of any loans, credits, or indebtedness then outstanding against this policy, or due from the assured to the company, issue a paid-up policy for such an amount as the surrender value of the premiums received hereon would purchase as a single premium.

And the said company do hereby promise and agree well and truly

to pay or cause to be paid at their office the said sum insured to the party to whose benefit this insurance shall lawfully enure, within three months after due notice and satisfactory proof of the death, during the continuance and before the termination of this policy, of the said party whose life is hereby insured; provided however, that there shall
9 first be deducted therefrom the balance of the y ar's premium (if any) and any counter-claim or indebtednes hereinbefore mentioned. Provided, always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted upon the following conditions: That in case the said party whose life is insured shall, without the written consent of this company previously obtained, travel upon the seas (except in voyages between coastwise ports of the United States) or shall pass beyond the civilized settlements in the United States (excepting into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick), or shall, without such previous consent thus obtained, enter into any military or naval service whatever (the militia not in actual service excepted), or shall personally engage in blasting, mining, submarine operations, or the production of dangerously inflammable or explosive substances, or in any other extra-hazardous occupation, or die by his own hand or act, sane or insane, or in consequence of a duel, or by the hand of justice, or in the known violation of any law of this State or of
10 the United States, or of the said provinces, or of any State, county, or Territory in which he may be, or shall become so far intemperate as to induce delirium tremens, or shall die in consequence thereof, then this policy shall be null and void, but in the event of death by the hand or act of the party whose life is hereby assured, while this policy is in force, the said company will, upon the surrender thereof, referred to the lawful owner of this policy the premiums paid hereon (less any dividends that may have been paid on such premiums), with interest at the rate of seven per centum per annum on such premiums paid, to be computed from the date of the payment thereof.

And also this policy of insurance is made upon the express condition that application No. 50302, now on file in the office of said company, is an express warranty of the truth of the answers and statements contained in said application and in the documents annexed thereto or accompanying the same. And if the said application, statements, or documents are in any respect untrue, then this policy is void and of
11 no effect, either to the insured or any party whatsoever interested herein. And the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or failure to pay the principle or interest of any note, obligation, or other indebtedness for premium at the time such principle or interest shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein.

And it is further provided, that in case said company shall at any time accept a payment of premium upon this policy after the day when the same shall by the terms thereof become due and payable such acceptance shall not in any respect be deemed to enlarge the time for the payment of the annual premiums thereafter to become due upon this policy, or be deemed any evidence of a usage of said company to receive payment of premiums after the same becomes due and payable by the terms of this policy.

Any renewal of this policy, or any permit, consent, or agreement relating thereto, and all other contracts, endorsements, instru-

12 ments, or writings of what kind soever in the name of the Knickerbocker Life Insurance Company, or undertaking or importing any act to be done *a* liability to be incurred by the said company, must be signed by the president and secretary thereof, and whenever not so signed is hereby repudiated and declared void, and will in no case be recognized by the said company.

Neither this policy of insurance or renewal receipts of the same will be valid until actual payment of the premium.

Free permits will be granted, upon application at the office of the company, to the holder of this policy to reside in Europe and to make voyages between the United States and Europe in steamships or first-class sailing vessels only.

For a voyage by any other vessel or to any other foreign country, except as above stated, special permit must be applied for and obtained from the company.

In witness whereof the said Knickerbocker Life Insurance Company have caused this contract to be signed by their president and secretary, at the city of New York, this sixth day of January, one
13 thousand eight hundred and seventy-two.

(Signed) ERASTUS LYMAN,
President.

(Signed) GEO. F. SNIFFEN,
Secretary.

No. 4.—EXHIBIT B.

Dividend certificate of additional insurance.

No. 50302.] [$36.$\frac{03}{100}$.

KNICKERBOCKER LIFE INSURANCE CO., OF THE CITY OF NEW YORK.

This certificate witnesseth that the Knickerbocker Life Insurance Company, in consideration of the profits realized upon premiums received on policy 50302 of said company prior to the date hereof, do assure the life of H. H. Badenhop, now insured under said policy, for the further amount of thirty-six and $\frac{03}{100}$ dollars, for the benefit of the person or persons to whom said policy shall be payable, subject, however, to all the rules, restrictions, and provisions expressed in or governing the original policy and so provided by the charter of said company and amendments thereto.

And it is further understood and agreed that this policy is payable upon the termination of said original policy by death or maturity, provided the latter be then in full force.

14 In witness whereof the Knickerbocker Life Insurance Company have caused this contract to be signed by their president and secretary, at the city of New York, this twentieth day of May, one thousand eight hundred and seventy-three.

(Signed) C. STANTON,
President.

(Signed) GEO. F. SNIFFEN,
Secretary.

No. 5.—EXHIBIT C.

No. 50302.] [$39 $\frac{36}{100}$.

Additional insurance under policy No. 50302, issued by the Knickerbocker Life Insurance Company, of the city of New York.

Whereas the Knickerbocker Life Insurance Company, in the apportionments of its profits among its policy-holders on the first day of January, 1874, did assign to policy No. 50302 a sufficient sum to procure the additional insurance hereinafter specified upon the conditions hereinafter stated:

Now, therefore, in consideration of the premises and of one dollar, the said Knickerbocker Life Insurance Company doth assure the life of H. H. Badenhop, now insured under said policy, for the further amount of thirty-nine $\frac{36}{100}$ dollars, for the benefit of the person or persons to whom said policy shall be payable, subject to the provisions to the charter of said company and the amendments thereto, and to all the conditions, restrictions, and provisions contained in said policy, and payable only when the company shall become liable to pay the amount insured thereby, it being understood and agreed by and between the company and the owner of said policy that such additional insurance shall cease and be of no effect in case said policy shall for any cause terminate and become void. It is further understood and agreed that in case the owner of said policy shall at any time accept the surrender value of such additional insurance, either by the payment thereof to him or to her in cash, or by applying the same in payment of premium or notes given for premium on said policy, then this certificate shall become void and said additional insurance shall cease.

In witness whereof the Knickerbocker Life Insurance Company has caused this instrument to be given by its president and secretary, at the city of New York, this 22nd day of June, one thousand eight hundred and seventy-four.

(Signed) J. A. NICHOLS,
President.

(Signed) GEO. F. SNIFFEN,
Secretary.

Clerk's certificate.

OFFICE C. C. P. & G. S.,
Charleston County.

I certify the foregoing 15 pages to be true copies of the original complaint and Exhibits A, B, & C, now on file and of record in my office.
25 March, 1878.

[SEAL.] JNO. H. OSTENDORFF,
C. C. P. & G. S.

No. 6.—*Summons.*

THE STATE OF SOUTH CAROLINA,
County of Charleston:

Court of common pleas.

BARTHOLEMEW FOLEY, PLAINTIFF,
against
THE KNICKERBOKER LIFE INSURANCE COMPANY, of the city of New York, defendant.

Summons for money demand. (Complaint served.)

To the Knickerbocker Life Insurance Company, of the city of New York, defendant in this action:

You are hereby summoned and required to answer the complaint in

this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscribers at their office, 35 Broad
17 street, Charleston, South Carolina, within twenty days after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid, the plaintiff will apply to the court for judgment against you for the sum of five thousand two hundred and twenty-one and $\frac{75}{100}$ dollars, with interest on the sum of five thousand and seventy-five and $\frac{39}{100}$ dollars at the rate of seven per cent. per annum from the eleventh day of September, one thousand eight hundred and seventy-seven, and legal interest on the sum of one hundred and forty-five $\frac{75}{100}$ dollars from the date hereof, and costs.

Dated 19 February, A. D. 1878.

BRYAN AND BRYAN,
Plaintiff's Attorney.

No 7.—*Acceptance of service.*

I hereby acknowledge and accept service of a copy of the within summons and complaint this nineteenth day of February, A. D. 1878, at Charleston, South Carolina.

WM. S. HASTIE,
Ag't Knickerbocker L. I. Co.

18 *Clerk's certificate.*

OFFICE C. C. P. & G. S.,
Charleston County.

I certify the foregoing to be a true copy of the original summons on file and of record in my office.

25 March, 1878.

JNO. H. OSTENDORFF,
C. C. P. & G. S.

And on the 16th day of March, A. D. 1878, came into court the defendants The Knickerbocker Life Insurance Company, by its attorney, A. G. Magrath, and filed the following notice of appearance; which notice is in the words and tenor following:

No. 8.—*Notice of appearance.*

STATE OF SOUTH CAROLINA,
County of Charleston:

Court of common pleas.

BARTHOLEMEW FOLEY, PLAINTIFF,
against
THE KNICKERBOCKER LIFE INSURANCE COMPANY, of the city of New York, defendant. } Notice of appearance.

SIR: Please to take notice that the defendant above named
19 appears in this action, and that I am retained as attorney for the said defendant therein. Dated Charleston, March 6th, 1878.

Yours, &c.,

A. G. MAGRATH,
Defendant's Attorney, No. 32 Broad Street.

To BRYAN AND BRYAN, Esq'r's,
Plaintiff's Attorneys.

No. 9.—*Acceptance of service.*

We admit due service of the within notice this 6th March, 1878.

BRYAN AND BRYAN.

Clerk's certificate.

OFFICE C. C. P. & G. S.

I certify the foregoing to be a true copy of the original notice of appearance on file and of record in my office.

[SEAL.] JNO. H. OSTENDORFF,
C. C. P. & G. S.

25TH MARCH, 1878.

And on the 16th day of March, A. D. 1878, came into court the defendant, The Knickerbocker Life Insurance Company, by its attorney, A. G. Magrath, and filed the following notice of motion for removal of cause; which notice is in the words and tenor following:

No. 10.—*Notice of motion for removal of cause.*

STATE OF SOUTH CAROLINA,
Charleston County:

In the common pleas.

BARTHOLEMEW FOLEY, PLAINTIFF,
against
THE KNICKERBOCKER LIFE INSURANCE COMPANY, of the city of New York, defendants.

To Messrs. Bryan and Bryan, plaintiff's attorneys:

SIRS: You will please take notice that on Friday, the 16th instant, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, I will move, before the presiding judge, at the court-house, in the city of Charleston, for an order removing the above cause to the circuit court of the United States for the district of South Carolina.

Very truly,

A. G. MAGRATH,
Defendant's Attorney.

CHARLESTON, *March 6th*, 1878.

No. 11.—*Acceptance of service.*

We admit due service of the within notice this 6th day of March, 1878.

BRYAN AND BRYAN.

Clerk's certificate.

OFFICE C. C. P. & G. S.,
Charleston County.

I certify the foregoing to be a true copy of the original notice on file and of record in my office.

[SEAL.] JNO. H. OSTENDORFF,
C. C. P. & G. S.

25TH MARCH, 1878.

And on the 16th day of March, A. D. 1878, came into court the defendant, The Knickerbocker Life Insurance Company, by its attorney, A. G Magrath, and filed the following petition for removal of cause to the circuit court of the United States for the district of South Carolina; which petition is in the words and tenor following:

No. 12.—*Petition for removal to the circuit court of the United States for the district of South Carolina.*

THE STATE OF SOUTH CAROLINA,
First Circuit, Charleston County:

In the court of common pleas.

22 BARTHOLEMEW FOLEY, PLAINTIFF,
against
THE KNICKERBOCKER LIFE INSURANCE COMpany, of the city of New York, defendants. } Petition.

To the honorable the presiding judge:

The petition of The Knickerbocker Life Insurance Company, of the city of New York, respectfully sheweth:

That the above action has been commenced in this honorable court by Bartholemew Foley against your petitioner; that the matter and amount in dispute *in dispute* in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner is a corporation duly chartered by the legislature of the State of New York, and is and was at the time of the commencement of this suit, in the contemplation of law, a citizens of the State of New York, and that the said Barth'emew Foley was then and still is a citizen of the State of South Carolina.

23 And your petitioner herewith offers a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law and accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States for the district of South Carolina.

And your petitioner will ever pray.

THE KNICKERBOCKER LIFE INS. CO.,
By J. A. NICHOLS, *President.*
A. G. MAGRATH, *Pro Pet.*

STATE OF NEW YORK,
County of New York:

I, J. A. Nichols, being duly sworn, do say that I am presi-
24 dent of the Knickerbocker Life Insurance Company, of the city of New York; that I have read the foregoing petition, and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

J. A. NICHOLS.

Subscribed by the said J. A. Nichols, president, in my presence and by him sworn to before me this 11th day of March, A. D. 1878.

[SEAL.] JOHN C. FOSTER,
Notary Public.

Clerk's certificate.

OFFICE C. C. P. & G. S.,
Charleston County.

I certify the foregoing to be a true copy of the original petition on file and of record in my office.

[SEAL.] JNO. H. OSTENDORFF,
C. C. P. & G. S.

25TH MARCH, 1878.

And on the 16th day of March, A. D. 1878, came into court the defendant, The Knickerbocker Life Insurance Company, by its attorney, A. G. Magrath, and filed the following bond, to remove cause to
25 circuit court of the United States; which bond is in the words and tenor following:

No. 13—*Bond.*

THE STATE OF SOUTH CAROLINA,
Charleston County:

In the common pleas.

BARTHOLEMEW FOLEY
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY, of the city of New York.

Know all men by these presents that we, The Knickerbocker Life Insurance Company, of the city of New York, and Elisha B. Rollins, of the city of Brooklyn, Kings County, in the State of New York, are held and firmly bound unto Barth'emew Foley, the plaintiff in the above-entitled cause, in the full and just sum of one thousand dollars, to be paid to the said Bartholemew Foley, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made and done, we bind ourselves, jointly and severally, firmly by these presents, sealed with our seals and dated the eleventh day of
26 March, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above-named Bartholemew Foley has commenced an action in court of common pleas for Charleston County, in the said State, against the Knickerbocker Life Insurance Company, of the city of New York; and whereas the said company has entered its appearance in the said action in said court, and filed its petition for the removal of the cause into the next circuit court of the United States, to be held on the first Monday in April next, at Charleston:

Now, therefore, the condition of the above obligation is such that if the said The Knickerbocker Life Insurance Company, of the city of New York, on the first day of the session, shall enter in said circuit court a copy of the record in such suit, and shall pay all costs that may be awarded by the said circuit court, if the said court shall hold that said

suit was wrongfully or improperly removed, then this obligation shall be void; otherwise to remain in full force.

THE KNICKERBOCKER LIFE INS. CO.,
By J. A. NICHOLS, *President.* [SEAL.]
E. B. ROLLINS. [SEAL.]

Sealed and delivered in the presence of—
JOHN C. FOSTER.

27 STATE OF NEW YORK,
City and County of New York, ss:

Elisha B. Rollins, one of the obligors named in the foregoing bond, being duly sworn, deposes and says that he is a resident and freeholder within this State, and is worth the sum of two thousand dollars over and above all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

E. B. ROLLINS.

Sworn to before me this 11th day of March, 1878.
[SEAL.] JOHN C. FOSTER,
Notary Public.

STATE OF NEW YORK,
City and County of New York, ss:

On this 11th day of March, in the year A. D. 1878, before me personally came John A. Nichols, the president of the Knickerbocker Life Insurance Company, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resided in the city of Brooklyn; that he was the president of the Knickerbocker Life Insurance Company; that he knew the corporate seal of said company; that
28 the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed his name thereto by the like order as president of said company.

[SEAL.] JOHN C. FOSTER,
Notary Public.

STATE OF NEW YORK,
City and County of New York, ss:

On this 11th day of March, in the year A. D. 1878, before me personally came Elisha B. Rollins, to me known, and known to me to be one of the individuals described in and who executed the within instrument, and acknowledged to me that he executed the same.

[SEAL.] JOHN C. FOSTER,
Notary Public.

Clerk's certificate.

OFFICE C. C. P. & G. S.,
Charleston County.

I certify the foregoing to be a true copy of the original bond on file and of record in my office.

[SEAL.] JNO. H. OSTENDORFF,
C. C. P. & G. S.

25TH MARCH, 1878.

29 And on the 16th day of March, A. D. 1878, came into court the defendant, The Knickerbocker Life Insurance Company, by its attorney, A. G. Magrath, and obtained the following order to transfer cause to the United States circuit court; which order is in the words and tenor following:

No. 14.—*Order.*

The State of South Carolina, in the common pleas, Charleston County, first circuit.

BARTHOLEMEW FOLEY, PLAINTIFF,
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY, of the city of New York, defendant.

A petition having been filed by the defendant in this cause, an appearance having been previously entered herein praying for a removal thereof into the circuit court of the United States for the district of South Carolina, pursuant to the statutes of the United States in such case made and provided, and the said petitioner having offered
30 good and sufficient security, pursuant to the direction of and as required by the said statutes, now, on motion of A. G. Magrath, counsel for the petitioner, and as it appears to the satisfaction of this court that the present suit is commenced by a citizen of South Carolina against the citizen of another State, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs—

It is now declared and ordered that this court accepts the surety offered by the petitioner, and that the said cause be removed for trial into the next circuit court of the United States for the district of South Carolina, pursuant to the said statutes, and that this court do proceed no further therein, and that all proceedings in this court in the said cause be, and the same are hereby, stayed.

W. H. WALLACE,
Circuit Judge.

16TH MARCH, 1878.

Clerk's certificate.

OFFICE C. C. P. & G. S.,
Charleston Co.

I certify the foregoing to be a true and correct copy of the original order on file and of record in my office.

[SEAL.] JNO. H. OSTENDORFF,
C. C. P. & G. S.

MARCH 25TH, 1878.

31 And on the 26th day of March, A. D. 1878, came into the circuit court of the United States for the district of South Carolina the defendant, The Knickerbocker Life Insurance Company, by its attorney, A. G. Magrath, and filed the following answer; which answer is in the words and tenor following:

No. 15.—Answer.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the circuit court.

BARTHOLEMEW FOLEY, A CITIZEN OF THE State of South Carolina, plaintiff,
against
THE KNICKERBOCKER LIFE INSURANCE COMPANY, of the city of New York, a corporation created by and under the laws of the State of New York, defendants.

The defendant', answering the first cause of action contained in the complaint of the plaintiff herein, says:

1. They admit the allegations in the 1, 2, 4, and 5 paragraphs thereof contained.

32 2. They have no knowledge or information sufficient to form a belief as to the truth of the allegations in the third paragraph of the first cause of action of this said complaint contained.

3. They deny that the said H. H. Badenhop has departed this life as is alleged in the 6th paragraph of the first cause of action of the said complaint.

4. They deny that the said plaintiff and the said H. H. Badenhop have fulfilled all the conditions of the said policy of insurance; and they do aver that the said plaintiff and the said H. H. Badenhop did not make true and correct answers and statements to certain questions contained in the application for the said policy of insurance, in that in the said application it is stated that the occupation of the said H. H. Badenhop was of a merchant, when in fact it was not that of a merchant. To the questions, "Is the party of temperate habits?" "Has he always been so?" the answer given is "Yes," when, in fact, the said H. H. Badenhop was a man of very intemperate habits, by the said answer concealing the true habits of the said H. H. Badenhop, and making a false statement of the same; that after the said policy of insurance had been issued the habits of the said

33 H. H. Badenhop became and were so intemperate as to induce delirium tremens; wherefore the said policy of insurance became and was thenceforth void.

5. That by reason of the said incorrect answers and misstatements the conditions of the said policy of insurance were violated, and in consequence thereof the said policy became void and of none effect.

6. They deny that they are indebted to the plaintiff in the sum of $\$5{,}075\frac{39}{100}$, with interest from the 11th day of September, A. D. 1877, as is stated in the 8th paragraph of the first cause of action, or in any other sum of money.

The defendants, answering the second cause of action contained in the complaint of the plaintiff herein, say: They admit that the plaintiff did pay to them on the 6th day of January, 1876, the sum of $\$145\frac{75}{100}$, that being the amount of the annual premium, but without their knowledge at the time; nor did the defendants, until after that time, know that the said H. H. Badenhoff had delirium tremens, induced by his intemperate habits, and that at the time of making his application he

was of intemperate habits, continuing up to the time of his alleged death.

34 Wherefore the defendants pray judgment, that the said complaint of the plaintiff be dismissed, and that they be adjudged their costs and expenses in this behalf sustained.

A. G. MAGRATH,
Def'd't's Att'y.

STATE OF NEW YORK,
County of New York:

John A. Nichols, being duly sworn, says that he is the president of the Knickerbocker Life Insurance Company, of the city of New York, the defendants above named; that the foregoing answer is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that they are a corporation.

J. A. NICHOLS.

Sworn to before me this eighteenth day of March, A. D. 1878.
[SEAL.] JOHN C. FOSTER,
Notary Public, Kings Co., N. Y.

Certif. filed in N. Y. Co.

35 No. 16.—*Acceptance of service.*

We accept service of a copy of the within answer this 23rd day of March, A. D. 1878.

BRYAN & BRYAN,
Plaintiff's Attorneys.

And on the 16th day of September, A. D. 1878, came into court the defendants, The Knickerbocker Life Insurance Company, by its attorney, A. G. Magrath, and obtained the following order to suspend putting seal to commission, which order is in the words and tenor following:

Order.

United States circuit court at chambers.

BARTHOLEMEW FOLEY, PLAINTIFF,
vs.
THE KNICKERBOCKER LIFE INS. CO., DEFENDANT.

In this case it appearing that interrogatories for the examination of Dr. Charles L. Parker, Dr. Curtis T. Fenn, and A. V. Steinhausen,
witnesses for the plaintiff, by Messrs. Bryan & Bryan, plaintiff's
36 attorneys, were filed in the clerk's office in South Carolina on the 6th day of September, 1878, at which time A. G. Magrath, the defendant's attorney, was then & is now engaged in a case before me, the hearing of which was commenced on the 4th day of September, & is still before me for argument, it being represented that under these circumstances reasonable time should be allowed the defendant's attorney to file his cross-interrogatories for the examination of the said

witnesses, it is therefore ordered that the clerk of the circuit court for South Carolina do withhold the seal of the court from the commission applied for in said case until the expiration of ten days from the conclusion of the argument by Mr. Magrath in the cases now before me in which he is engaged.

13 September, 1878.

HUGH L. BOND, *Ct. Judge.*

And on the 19th day of September, A. D. 1878, came into court the plaintiff, Bartholemew Foley, by his attorn*ies*, J. N. Nathans & Bryan & Bryan, and obtained the following order rescinding and vacating previous order to suspend putting seal to commission, which order is in the words and tenor following:

No. 17.—*Order.*

37 THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In circuit court.

B. FOLEY
vs.
THE KNICKERBOCKER INSURANCE CO.

On motion of J. N. Nathans, of counsel for plaintiff, it is ordered that *that* the injunction heretofore issued the above case restraining J. E. Hagood, esq., clerk of this court, from issuing commission to take testimony of certain persons in Chicago in behalf of plaintiff be, and the same is hereby rescinded and vacated, the said injunction having been improvidently issued.

HUGH L. BOND,
Ct. Judge.

SEPT. 17, 1878.

No. 18.—*Trial of cause.*

And at the November term, 1878, of said circuit court, begun and holden in the city of Columbia, for the district aforesaid, this cause came before jury No. 2. After various challenges by the plaintiff and defendant, the following jury was organized and sworn in, to wit:
38 James M. Wilson, foreman, A. P. Holmes, H. H. Marzou, R. E. Wilds, A. B. Pennington, James Russell, Wilson Cook, Henderson Goode, J. F. Addie, R. S. Beckham, W. C. Barr, and John Brandon, complaint and answer were read, and the following witnesses were sworn and examined on the part of the plaintiff, to wit, Bartholemew Foley, Hutson Lee, Dr. Charles Brown, Dr. T. Reenstjema, William Luders, and William Gorman, and the testimony taken by commfssion of Hugh McLaughlin, A. V. Steinhausen, Charles T. Parker, Dr. Curtis T. Fenn, and Oratio P. Wright were read, and the following witnesses were sworn and examined on behalf of the defendant, to wit, Dr. F. M. Robertson, J. H. Ostendorff, and F. W. Pieper. The case was submitted to the jury by consent of the attorneys in the cause without argument.

And the plaintiff, by his attorneys, Bryan & Bryan and J. N. Nathans, *and* prayed the court for the following instructions to the jury; which instructions are in the words and tenor following:

No. 19.—*Instructions.*

FOLEY
vs.
INSURANCE COMPANY.

39 Instruction prayed by plaintiff.

1. The question of the death of H. H. Badenhop is to be determined by the jury in view of all the facts proved in this case. Identity of person is to be inferred from identity of name with other circumstances.

It is a question of fact for the jury in the light of all the evidence whether H. H. Badenhop mentioned in the policy is the Henry Badenhop who is proved to have died in Cook County hospital, Chicago, Jan. 11, 1875.

2. H. H. Badenhop having disclosed the true nature of his business to the agent of the company, and the agent having classified it as that of a "merchant," the company is estopped from the allegation that the same is false.

In deciding the question of fact whether the answer of H. H. Badenhop, that he was a merchant, is a false representation, the jury will understand the word "merchant" in any of its ordinarily accepted meanings.

3. If the jury find from the evidence that the habits of H. H.
40 Badenhop at the time of, or at any time prior to, the application were not temperate, the *the* affirmative answers to the questions "Are you a man of temperate habits?" "Have you always been so?" were untrue, and the policy is avoided thereby. But if the jury find from the evidence that the "habits" of H. H. Badenhop, *i. e.*, the usual ordinary and customary practice and usage of his life, were temperate, then the jury will find that the representatations aforesaid are not untrue, although the jury may believe that H. H. Badenhop did have an attack of deliriumtremens as the result of an exceptional excessive indulgence in drink prior to the issue of the policy.

4. That the burden of proof is upon the company to establish the breach of the warranty.

5. In construction of the meaning of the warranty the words used by the company are to be construed strictly as against the company and most favorably to the insured.

BRYAN & BRYAN.
J. N. NATHANS.

41 And the defendants, by their attorney, A. G. Magrath, prayed the court for the following instructions to the jury; which instructions are in the words and tenor following:

No. 20.—*Instructions.*

In the U. S. circuit court, So. Ca. district.

BARTHOLEMEW FOLEY, PLAINTIFF,
vs.
THE KNICKERBOCKER LIFE INSURANCE CO.,
defendant.

The defendant in the above case will ask the judges of the said court to charge the jury:

1st. First. That, in the application made by the plaintiff for insur-

ance of the life of H. H. Badenhop, the words in the said application "should a policy be issued upon this application, such policy will state that it is made upon the express condition that this application is an express warranty of the truth of the answers contained herein & in statements or documents annexed to or accompanying the same (if any), & that said application, statements, and documents shall be deemed to form a part & parcel of such policy; and if the said application or statements or documents are in any respect untrue, then such
42 policy will be void & of no effect either to the insured or any party whatsoever interested therein."

And the words in the policy in this case: "And also this policy is made upon the express condition that application No. 50302, now on file in the office of said company, is an express warranty of the truth of the answers & statements contained in said application & in the documents annexed thereto accompanying the same; and if the said application, statements, or documents are in any respect untrue, then this policy is void & of no effect, either to the insured or any party whatsoever interested herein," constitute a warranty on the part of the assured, or party whose life is insured, of the truth of the answers contained in the said application. And if such answers in the said application are untrue, then the policy is void & of no effect to the insured, or any party interested therein; & such is the rule laid down by the Supreme Court in Jeffries vs. Life Ins. Co., 23 Wallace, 47, & Ætna Life Ins. Co. v. Fance, 91 U. S. R., 511.

2. Second. That, in considering the answers in the application to the questions therein set forth, the jury, upon the evidence here produced, can only inquire & determine whether such answers are true
43 or not; & if they are or were in any respect untrue, the policy is void & of no effect, & the verdict should be for the defendant.

3. Third. That when in answer to the 4th question, concerning the occupation of the party whose life was sought to be insured, the answer given was that such occupation was that of a "merchant," the jury must decide whether that answer did truly describe to the insurer the real occupation of the party whose life was sought to be insured so that the insurer became truly informed of his occupation.

4th. Fourth. That when, in answer, "Is the party of temperate habits?" "Has he always been so?" the answer given was "Yes," it was the warranty that the answer was true, both in respect to the habits of the party whose life was insured at the time when the application was made and also as to his habits at all previous periods of his life. And if at both or either of such periods he was not of temperate habits, & the answer therefore untrue, the policy is void & of no effect, either to the insured or any person whatsoever interested therein. That the jury cannot in any manner consider the materia'ity of the answer, but simply whether it was true or untrue, & if untrue the verdict must be for the defendant.

44 5th. Fifth. That where, in a question whether the party assured is one of temperate habits at the time when he seeks to be insured, & has always been so, witnesses testify, from their own knowledge of the party & his habits, that he was not of temperate habits, their testimony is entitled to greater consideration by a jury than witnesses who testify otherwise, because they have not seen or known of such habits as are testified to by those who declare that he was not a person of temperate habits.

6th. Sixth. That to entitle the plaintiff to recover he must prove to

the of the jury that he had an insurable interest in the life of party insured to the amount claimed by him, the death of that party, & the performance of every precedent condition or warranty contained in the policy.

Whereupon the court charged the jury as follows; which charge is in the words and figures following:

No. 21.—*Charge.*

If the jury find from the evidence that the defendant company issued the policy of insurance upon the life of H. H. Badenhop offered in evidence, by which it agreed to pay upon his death the sum of money
45 stated therein, and find further from all the evidence in the cause that the assured since died, then the plaintiff is entitled to recover such insurable interest as he had in the life of the assured not exceeding the amount of the policy.

Unless the jury find from the evidence that the assured, in his application for the policy, made representations to the company or its agent which were untrue in some respect, or by some act of his after its issue avoided the same.

But the jury are instructed that if they find from the evidence that the assured disclosed the true nature of his business to the agent of the company who wrote out his application and called him therein or classified him as a merchant, the company is estopped from calling that allegation false.

The jury are instructed that all the representations in the application for the policy of insurance are warranties that such representations are true, and if the jury find from the evidence that the habits of the assured, Badenhop, at the time of or any time prior to the application, were not temperate, then the answers made by him to the ques-
46 tions "Are you a man of temperate habits?" "Have you always been so?" were untrue, and the policy is void. But if the jury find that the habits of H. H. Badenhop in the usual, ordinary, and everyday routine of his life were temperate, then such representations were not untrue within the meaning of the policy, although the jury may find that the assured had an attack of delirium tremens resulting from an exceptional indulgence in drink prior to the issue of the policy.

The burden of proof is upon the defendant to show the breach of any warranty in the policy.

And under the charge from the court the jury retired to their room, and after due consideration thereof returned into court, and upon their oaths returned the following verdict:

Verdict.

We find for the plaintiff in the sum of five thousand two hundred and twenty-one $\frac{75}{100}$ ($5,221.75), with interest on $5,075.39 from 11th September, 1877, and interest on $145.75 from 19th February, 1878.

Dec. 12, 1878.

JAMES M. WILSON, *Foreman.*

47 And on the 23rd day of December, A. D. 1878, came into court the attorneys for the plaintiff and defendants, and prayed the court to sign their bill of exceptions; which bill is in the words and tenor following:

No. 22.—*Bill of exceptions.*

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

BARTHOLEMEW FOLEY, A CITIZEN OF THE State of South Carolina,
vs.
THE KNICKERBOCKER LIFE INSURANCE Company, of the city of New York, a corporation created under and by the laws of the State of New York.

The issues in said action came on for trial before the honorable the judges of the circuit court of the United States for the district of South Carolina.

A jury was called and sworn.

The plaintiff, to maintain the issues on his part, proved the issuing of the policy by the defendant company, the death of the insured
48 on the 11' day of January, 1875, and the interest of the plaintiff in the life of the insured, by the introduction of the original policy of insurance, and additional certificates of insurance thereunder; and by B. FOLEY, the plaintiff, who testified that he effected the insurance on the life of H. H. Badenhop as security for the payment of certain promissory notes, aggregating about five thousand dollars, given by H. H. Badenhop to him for money sent and advanced, and that plaintiff paid the annual premium in 1876, after death of the insured, under protest.

HUTSON LEE, the agent of the company, who testified that he had made out and submitted the application, and by other witnesses; and that at the time of the application and issuing the policy the insured was in perfect health and as good a risk as he ever took.

That Badenhop disclosed the nature of his business to him at the time of the application, saying that he kept a bar & restaurant, and sold liquors by the bottle and five gallons.

That thereupon he, the agent, classified as a merchant; and that he, the agent, knew the facts disclosed as regards his business were true.

49 That he had known him and regarded him as a man of temperate habits, and commissions establishing the death of the insured.

The plaintiff *their* rested his case.

The defendants denied liability to the plaintiff, and to sustain the denial of liability on their part, examined witnesses to prove a breach of the warranty by reason of certain false answers and statements made in the application for the policy of insurance; in that in answer to the questions "Is the party of temperate habits?" "Has he always been so?" the answer given is "Yes," when that answer was untrue; and that the occupation of H. H. Badenhop is given as that of a "merchant," when in fact he was not a "merchant," but keeper of a saloon and restaurant.

The application for the insurance was before the court; and that the answers given to the questions in the said application were untrue were maintained by the introduction of Dr. F. M. ROBERTSON, who tes-

tified that during the year 1871, and the early part of 1872, he was the family physician of H. H. Badenhop; that he attended the wife
50 of Badenhop in May, 1871, in confinement; at that time Badenhop was drinking hard and annoyed him very much; had to put him to sleep; he was annoying to his wife; had to keep him out of her room.

In the year 1871 he attended Badenhop for "delirium tremens," and once or twice during that year for indisposition produced as he thought from the excessive use of intoxicating drink. Robertson did not say answer was untrue, but that he regarded him as of intemperate habits.

F. W. PIEPER, who testified that he was intimate with Badenhop; that he was a very intemperate man; had seen him frequently very much under the influence of liquor; that he was keeper of a saloon and restaurant. John H. Ostenrdorff testified that he had known Badenhop several years; that he was a very intemperate man; had seen him frequently under the influence of liquor; he was keeper of a saloon and restaurant.

The defendants there closed.

The plaintiff in rebuttal introduced the following witnesses: Hudson Lee, B. Foley, T. Reenstjema, W. German, and Dr. Brown.

51 The testimony of the plaintiff' witnesses in rebuttal was as follows:

HUTSON LEE, agent of the insurance company:

That at the time of the application and issuing of the policy H. H. Badenhop was in perfect health and was as good a risk as he ever took. That he has been insurance agent for ten years; that H. H. Badenhop disclosed the nature of his business to him (the agent) at the time of the application, saying that he kept a bar and restaurant and sold liquors by the bottle and five gallons. That thereupon witness classified H. H. Badenhop as a merchant, and that witness knew the facts disclosed as regards his business were true. That he had known H. H. Badenhop for several years previous to time of application and he regarded him a man of temperate habits. That in 1872 Badenhop went to Europe without a permit from the company, whereby the policy was forfeited, but that the company renewed the policy in 1873 upon an examination of H. H. Badenhop by a physician in Germany, a certificate of which was given to the company. That he knew Badenhop for several years previous to application; regarded him a man of temperate habits.

52 B. FOLEY knew Badenhop for fourteen years; saw him every day or every other day in 1871. He would take a drink like any other man; witness knew his habits during 1871. Saw him every day or every other day during 1871; never saw him under the influence of liquor. Knew his habits; he was a man of temperate habits. He lived in witness' house in latter part of 1871, and a part of 1872. He was very intimate with him.

Dr. T. REENTSJEMA testified he was the family physician of H. H. Badenhop for twelve years; never knew of any one else being called in except in cases of his wife's confinement, when H. H. Badenhop always got a married physician.

He knew H. H. Badenhop intimately for twelve years; knew him in 1870, 1871, 1872; knew his habits. He used alcoholic liquors; would take a drink like any other man. He would say he was a man of temperate habits. He was intimate with the family; corresponded with Badenhop & wife when they went away.

53 W. GORMAN testified he knew H. H. Badenhop for ten years. He was his copartner in Columbia in 1869 and 1870, for fourteen months, as coproprietor of the Columbia Hotel. He was a steady man; knew his habits. He was a man of temperate habits. Saw him in December, 1873; staid at witness' house six weeks; was then in fine health and was of temperate habits.

WILLIAM LUDERS knew Badenhop fourteen years; knew his habits; he was a man of temperate habits. Knew him in 1870, 1871, and 1872; during these years saw him often at Badenhop' house; visited there. He was a steady man.

Dr. CHARLES BROWN knew Badenhop nine years; he was a friend of mine; knew him in Walhalla, S. C., in 1866, and in Columbia in 1869. Saw him often; was intimate with him; regarded him a man of temperate habits; saw him in April, 1874; was in fine health then as always.

Dr. ROBINSON, (cross-examination):

That he did not know Badenhop intimately; had no relations with him other than professional, that he only saw him when he attended him professionally, & met him occasionally on the street.

54 FOLEY
vs.
INSURANCE COMPANY.

Instructions prayed by plaintiff.

1. The question of the death of H. H. Badenhop is to be determined by the jury in view of all the facts proved in this case.

Identity of person is to be inferred from identity of name with other circumstances.

It is a question of fact for the jury in the light of all the evidence whether H. H. Badenhop mentioned in the policy is the Henry Badenhop who is proved to have died in Cook County hospital, Chicago, Jan'y 11, 1875.

2. H. H. Badenhop having disclosed the true nature of his business to the agent of the company, and the agent having classified it as that of a "merchant," the company is estopped from the allegation that the same is false.

In deciding the question of fact whether the answer of H. H. Badenhop, that he was a merchant, is a false representation, the jury will understand the word "merchant" in any of its accepted meanings.

3. If the jury find from the evidence that the habits of H. H. Badenhop at the time of, or at any time prior to, the application
55 were not temperate, then the affirmative answers to the questions "Are you a man of temperate habits?" "Have you always been so?" were untrue, and the policy is avoided thereby. But if the jury find from the evidence that the "habits" of H. H. Badenhop *is* the usual, ordinary, and customary practice & usage of his life were temperate, then the jury will find that the representations aforesaid are not untrue, although the jury may believe that H. H. Badenhop did have an attack of delirium tremens as the result of an exceptional excessive indulgence in drink prior to the issue of the policy.

4. That the burden of proof is upon the company to establish the breach of the warranty.

5. In construction of the meaning of the warranty the words used by

the company are to be construed strictly as against the company, and most favorably to the insured.

BRYAN & BRYAN.
J. N. NATHANS.

The defendants prayed for the following instructions:

56 In the U. S. circuit court, So. Ca. district.

BARTHOLEMEW FOLEY, PLAINTIFF,
vs.
THE KNICKERBOCKER LIFE INSURANCE CO., defendant.

The defendant in the above case will ask the judges of the said court to charge the jury:

1st. First. That in the application made by the plaintiff for insurance on the life of H. H. Badenhop, "should a policy be issued upon this application, such policy will state that it is made upon the express condition that this application is an express warranty of the truth of the answers contained herein, and in statements or documents annexed to or accompanying the same (if any), and that said application, statements, and documents shall be deemed to form a part and parcel of such policy. And if the said application or statements or documents are in any respect untrue, then such policy will be void and of no effect either to the insured or any party whatsoever interested therein." And the words in the policy in this case, "and also this policy is made upon the express condition that application No. 50302, now on
57 file in the office of said company, is an express warranty of the truth of the answers & statements contained in said application and in the documents annexed thereto accompanying the same. And if the said application, statement, or document are in any respect untrue, then this policy is void and of no effect either to the insured or any party whatsoever interested herein," constitute a warranty on the part of the assured or party whose life is insured of the truth of the answers contained in the said application. And if such answers in the said application are untrue, then the policy is void and of no effect to the insured or any party interested therein; and such is the rule laid down by the Supreme Court in Jeffries v. Life Insurance Co., 23 Wallace, 47, and Ætna Life Insurance Co. v. France, 91 U. S. Reports, 511.

2. Second. That in considering the answers in the application to the questions therein set forth, the jury upon the evidence here produced can only inquire and determine whether such answers are true or not, and if they are or were in any respect untrue the policy is void and of no effect, and the verdict should be for the defendant.

58 3. Third. That when in answer to the 4th question concerning the occupation of the party whose life was sought to be insured the answer given was that such occupation was that of a "merchant," the jury must decide whether that answer did truly describe to the insurer the real occupation of the party whose life was sought to be insured so that the insurer became truly informed of his occupation.

4. Fourth. That when in answer, "Is the party of temperate habits?" "Has he always been so?" the answer given, "Yes," it was the warranty that the answer was true, both in respect to the habits of the party whose life was insured at the time when the application was made and also as to his habits at all previous periods of his life. And if at both

or either of such periods he was not of temperate habits, and the answer therefore untrue, the policy is void and of no effect, either to the insured or any person whatsoever interested therein. That the jury cannot in any manner consider the materiality of the answer, but simply whether it was true or untrue, and if untrue the verdict must be for the defendant.

5th. Fifth. That where in a question whether the party assured is one of temperate habits at the time when he seeks to be insured and
59 has always been so, witnesses testify from their own knowledge of the party and his habits that he was not of temperate habits, their testimony is entitled to greater consideration by a jury than witnesses who testify otherwise, because they have not seen or known of such habits as are testified to by those who declare that he was not a person of temperate habits.

6th. Sixth. That to entitle the plaintiff to recover he must prove to the satisfaction of the jury that he had an insurable interest in the life of the party insured to the amount claimed by him, the death of that party, and the performance of every precedent, condition, or warranty contained in the policy.

A. G. MAGRATH.

And the presiding judge, being the circuit judge, declined to give the instructions as prayed for by the counsel for the plaintiff and by the defendant; but did charge the jury as follows:

B. FOLEY
vs.
KNICKERBOCKER LIFE INS. CO.

Judge Bond charges:

60 If the jury find from the evidence that the defendant company issued the policy of insurance upon the life of H. H. Badenhop, offered in evidence, by which it agreed to pay upon his death the sum of money stated therein, and find further from all the evidence in the cause that the assured since died, then the plaintiff is entitled to recover such insurable interest as he had in the life of the assured, not exceeding the amount of the policy.

Unless the jury find from the evidence that the assured, in his application for the policy, made representations to the company or its agents which were untrue in some respects, or by some act of his after its issue avoided the same.

But the jury are instructed that if they find from the evidence that the assured disclosed the true nature of his business to the agent of the company who wrote out his application, and called him therein or classified him as a merchant, the company is so stopped from calling that allegation false.

The jury are instructed that all the representations in the application for the policy of insurance are warranties that such representa-
61 tions are true, and if the jury find from the evidence that the habits of the assured Badenhop, at the time or any time prior to the application, were not temperate, then the answer made by him to the question, "Are you a man of temperate habits?" "Have you always been so?" were untrue, and the policy is void. But if the jury find that the habits of H. H. Badenhop in the usual, ordinary, and every-day routine of his life were temperate, then such representations were not untrue within the meaning of the policy, although the jury may find

that the assured had an attack of delirium tremens resulting from an exceptional indulgence in drink prior to the issue of the policy.

The burden of proof is upon the defendant to show the breach of any warranty in the policy.

12th Dec., 1878.

Whereupon the counsel for the defendant, before the jury had withdrawn from the bar, did except to the charge so given, and especially that the presiding judge did refuse to charge the jury as prayed for in the fifth and sixth instructions asked for by the counsel for the defendant.

62 The case was then submitted to the jury.

The jury found a verdict for the plaintiff for $5,221.75, with interest on $5,075.39 from September 11, 1877, and interest on $145.75 from February 19th, 1878.

Wherefore the said defendants prayed the honorable the judges of the said court to sign and seal their foregoing bill of exceptions, which is accordingly done this twelfth day of December, 1878.

HUGH L. BOND. [SEAL.]
GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

And on the 23rd day of December, A. D. 1878, came into court the defendants, The Knickerbocker Life Insurance Co., by its attorney, A. G. Magrath, and obtained the following order for writ of error and allowance of appeal; which order is in the words and tenor following:

Order.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the circuit court.

63 BARTHOLEMEW FOLEY, PLAINTIFF,
against
THE KNICKERBOCKER LIFE INSURANCE COMPANY, defendants.

The defendants' exceptions in this case having been signed & sealed by the judges of this court, & the defendants having in open court prayed that their writ of error should be allowed, that the errors of law should be corrected & set aside in the Supreme Court of the United States, it is now ordered that the prayer of the defendants be granted & the writ allowed, upon the defendants entering & executing bond with good sureties, to be approved by the judges of this court, in the sum of ten thousand dollars, to answer all damages & cost if the said writ shall be adjudged against the said . It is further ordered that the defendants entering into & executing the said bond, the same shall be, when approved by the judges of this court, a supersedeas of the judgment in this case.

HUGH L. BOND,
Ct Judge.

DECEMBER 23, 1878.

64 And on the 30th day of December, A. D. 1878, came into court

the plaintiff, Bartholemew Foley, by his attorneys, Bryan & Bryan, and entered the following judgment; which judgment is in the words and tenor following:

No. 23.—*Judgment.*

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the circuit court.

BARTHOLEMEW FOLEY, PLAINTIFF,
against
THE KNICKERBOCKER LIFE INSURANCE COMPANY, defendants.
} Judgment by the court or jury.

This action having been brought to a trial at a circuit court held on the fourth Monday of November, A. D. 1878, and a verdict for the plaintiff having been rendered by the jury sworn in the cause for the sum of five thousand six hundred and seventy-four $\frac{47}{100}$ dollars, and the the costs having been adjudged at two hundred and seventy-eight $\frac{88}{100}$ dollars:

Now, on motion of Bryan & Bryan, attorneys for said Bartholemew Foley, it is adjudged that Bartholmew Foley recover of said Knickerbocker Life Insurance Company five thousand six hundred and seventy-four $\frac{47}{100}$ dollars so found, with two hundred and seventy-eight $\frac{10}{100}$ dollars costs.

65

BRYAN & BRYAN,
Plaintiff's Attorneys.

Tax costs signed. Judg't & execution this 30 day of December, 1878.
[SEAL.]
J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

No. 24.—*Endorsements on judgment.*

Amount and interest	$5,674 47
Cost and disbursements	$278 88
	$5,953 35

Filed 30 December, 1878, at 12 o'clock m.

J. C. HAGOOD,
C. C. C. U. S., Dist. S. C.

And on the 13th day of January, A. D. 1879, came into court the defendants, The Knickerbocker Life Insurance Company, by its attorney, A. G. Magrath, and filed the following appeal bond, which bond is in the words and tenor following:

No. 25.—*Bond.*

66

Supreme Court of the United States.

BARTHOLOMEW FOLEY
against
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

Know all men by these presents that we, The Knickerbocker Life

Insurance Company of the city of New York and State of New York, and Charles W. Lord, of the county of Baltimore, in the State of Maryland, and Peter G. Sauerwein, of Baltimore County, in said State, are held and firmly bound unto Bartholomew Foley, of the city of Charleston, in the State of South Carolina, in the sum of ten thousand dollars ($10,000), to be paid to the said Bartholemew Foley, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators and successors, firmly by these presents. Sealed with our seals, dated this sixth day of January, 1879.

67 Whereas the above-named The Knickerbocker Life Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of South Carolina:

Now, therefore, the condition of this obligation is such that if the above-named The Knickerbocker Life Insurance Company shall prosecute its said writ of error to effect and answer all costs and damages if said The Knickerbocker Life Insurance Company shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] THE KNICKERBOCKER LIFE INS. CO.,
By J. A. NICHOLS, *President.*
CHARLES W. LORD. [L. S.]
PETER G. SAUERWEIN. [L. S.]

Sealed and delivered in presence of—
GEORGE MORRIS BOND.

STATE OF MARYLAND,
City of Baltimore, ss:

Charles W. Lord, one of the obligors named in the within bond,
68 being duly sworn, says that he is a resident and landholder within this State, and is worth the sum of ten thousand dollars ($10,000) over and above all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me this 7th day of January, 1878.

[SEAL.] GEORGE MORRIS BOND,
United States Commissioner for the District of Maryland.

STATE OF MARYLAND,
City of Baltimore, ss:

Peter G. Sauerwein, one of the obligors named in the within bond, being duly sworn, says that he is a resident and landholder within this State, and is worth the sum of ten thousand dollars ($10,000) over and above all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me this 8th day of January, 1879.

[SEAL.] GEORGE MORRIS BOND,
United States Commissioner for the District of Maryland.

69 STATE OF MARYLAND,
City of Baltimore:

On the 7th day of January, 1879, before me personally came Charles

W. Lord, and on the 8th day of January, 1879, came Peter G. Sauerwein, both to me known, and known to me to be the individuals described in and who executed the within instrument, and severally acknowledged to me that they executed the same.

[SEAL.] GEORGE MORRIS BROWN,
United States Commissioner for the District of Maryland.

Approval of bond.

This bond is approved.

HUGH L. BOND,
Ct Judge.

70 No. 26.

THE UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of South Carolina, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, between Bartholomew Foley, plaintiff, and The Knickerbocker Life Insurance Company, of the city of New York, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid, being inspected, the said Supreme Court may cause
71 further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this the fourteenth day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] J. E. HAGOOD,
C. C. C., U. S. Dist. S. C.
A. G. MAGRATH,
Att'y for Plaintiff in Error.

72 CHARLESTON, *Feb'y* 19, 1879.

Personally appeared W. D. Hannifin, and made oath in due form of law that he served a copy of the within writ of error personally on Geo. D. Bryan at his office on February 19, 1879.

W. D. HANNIFIN,
Deputy U. S. Marshal.

Sworn to before me this 20th of February, 1879.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Entry & service, $2.50.

Indorsed: United States of America. The Knickerbacker Life Insurance Company, of New York, plaintiff in error, vs. Bartholomew Foley, defendant in error. A. G. Magrath, att'y for plaintiff in error. Filed 14 Feby, 1859. J. E. Hagood, C. C. C. & S., dist. S. C.

Entered in my office February 19, '59, folio 160.

R. M. WALLACE,
U. S. Marshal.

No. 25.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In circuit court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the record, proceedings, and verdict in the case of Bartholomew Foley, plaintiff, against The Knickerbacker Life Insurance Company, defendants, rendered as aforesaid, together with all things relating to the same.

Given under my hand and seal of the said court, at clerk's office, in the city of Charleston, for the district aforesaid, on this the 29th day of March, A. D. 1859.

J. E. HAGOOD,
C. C. C. & S., Dist. S. C.

SEAL.

Indorsement on cover: No. 212. The Knickerbacker Life Insurance Company, of the city of New York, plaintiff in error, vs. Bartholomew Foley. S. Carolina C. C. U. S. Filed 11th July, 1859.

IN THE SUPREME COURT.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

BARTHOLOMEW FOLEY, DEFENDANT IN ERROR.

Brief of A. G. Magrath for Plaintiff in Error.



IN THE SUPREME COURT

OF THE UNITED STATES.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,

vs.

BARTHOLOMEW FOLEY.

STATEMENT OF CASE.

The defendant in error, claiming to be a creditor of H. H. Badenhop, to the amount of five thousand three hundred dollars, made application for and caused to be made an insurance with the plaintiff in error, on the life of H. H. Badenhop, for the sum of five thousand dollars. The contract of insurance bears date 6th January, 1872. On the 20th May, 1873, from profits realized, there was added to the amount insured $36.62, and on the 22d June, 1874, the further sum of $39.36, making the aggregate amount of the insurance $5,079.39.

The defendant in error, in his complaint, alleges that H. H. Badenhop died on the 11th January, 1875, at Chicago. And that the said H. H. Badenhop, and the defendant in error each duly fulfilled all the conditions of insurance on their part, and that more than three months have elapsed since notice and proof of death has been furnished plaintiff in each. The policy of insurance declares that it "is made upon the express condition that application No, 50,302, now on file in the office of the said Company, is an express warranty of the truth of the answers and statements contained in said application, and in the documents annexed thereto, or accompanying the same. And if the said application, statements or documents are in any respect untrue, then this policy is void and of no effect; either to the insurer or any party whatsoever interested herein."

The action was commenced in the State Courts of South Carolina and removed to the Circuit Court of the United States.

In that Court the plaintiff in error answered the complaint; and among other defences denied that the said H. H. Badenhop and the defendant in error "have fulfilled all the conditions of the said policy of insurance," and avers that the said H. H. Badenhop and the defendant in error "did not make true and correct answers and statements to certain questions contained in the application for the said policy of insurance." The answer then specially refers to the questions: "Is the party of temperate habits?"

"Has he always been so?" And to the answer given to the same, "Yes." When in fact the said H. H. Badenhop was a man of very intemperate habits; by the said answer concealing the true habits of the said H. H. Badenhop, and making a false statement of the same. That after the said policy of insurance had been issued, the habits of the said H. H. Badenhop became and were so intemperate as to induce *delirium tremens*; wherefore the said policy of insurance became and was thenceforth void.

The case came on to be tried at the November Term, 1878, of the Circuit Court of the United States.

In regard to the issue of the truth or falsehood of the answers to the questions as to the habits of H. H. Badenhop, the evidence is found at pages 19, 20 and 21 of the record.

The testimony to establish the fact that H. H. Badenhop was not a man of temperate habits was furnished by Dr. F. M. Robertson, who, in 1871, was the family physician of the said H. H. Badenhop, attended him for *delirium tremens*, states that during the confinement of Badenhop's wife, in 1871, Badenhop was drinking hard, and annoyed him very much; had to put him to sleep; that he was annoying to his wife; had to keep him out of her room. Regarded him as of intemperate habits. This testimony was sustained by F. W. Pieper, who was intimate with Badenhop; says he was an intemperate man; frequently seen him under the influence of liquor. And also by J. H. Ostendorff, who knew Badenhop several years, says he was a very intemperate man, and had seen him frequently under the influence of liquor.

For the defendant in error, Hutson Lee, Agent of the Insurance Company, at the time the insurance was made, testifies that he knew Badenhop for several years previous to his application, and regarded him as a man of temperate habits.

B. Foley, who is the defendant in error, and claimant for the amount of the insurance, knew Badenhop for fourteen years; saw him every day or every other day in 1871; knew his habits; never saw him under the influence of liquor; says he was a man of temperate habits; that he lived in witness' house in 1871 and part of 1872; says he was a man of temperate habits.

Dr. Reentzjerna testifies: He was the family physician of H. H. Badenhod for twelve years; never knew of any one else called in, except in cases of his wife's confinement, when Badenhop always got a married man.

W. Gorman, who knew him for ten years, was his copartner in Columbia in 1869 and 1870, for fourteen months; he was a steady man; he was a man of temperate habits.

William Luders, who says he knew Badenhop fourteen years; knew his habits; said he was a temperate man.

Dr. Charles Brown, who knew Badenhop nine years; was intimate with him; regarded him a man of temperate habits.

With this testimony before the Court, the plaintiff prayed the Court for instructions to the jury, and specially as to the weight which should be given by the jury to the testimony offered on either side; on the one side to establish the fact that the assured was not a person of temperate habits; on

the other side to establish that he was. And for this purpose the fifth instruction was asked in these words:

"That where in a question whether the party assured is one of temperate habits at the time when he seeks to be insured, and has always been so, witnesses testify from their own knowledge of the party and his habits that he was not of temperate habits, their testimony is entitled to greater consideration by a jury than witnesses who testify otherwise, because they have not seen or known of such habits as are testified to by those who declare that he was not a person of temperate habits." And, also, the sixth.

These instructions the Circuit Judge declined to give; and, instead thereof, in concluding his instructions, told the jury "that if the habits of H. H. Badenhop, in the usual ordinary and every day routine of life were temperate, then such representations were not untrue within the meaning of the policy, although the jury may find that the assured had an attack of *delirium tremens* resulting from an exceptional indulgence in drink prior to the issue of the policy."

Whereupon the plaintiff in error presented exceptions in proper form, and the question under these exceptions is now before this Court.

ASSIGNMENT OF ERRORS.

1. In this, that his Honor, the Presiding Judge, should have charged the Jury that in an issue as to the habits of the assured, raised upon his answer to the question, "Is the party of temperate habits; has he always been so?" To which the answer given was, "yes," Witnesses who spoke positively from their own knowledge of the habits of the assured and regarded him as a man of intemperate habits, having seen him "frequently under the influence of liquor;" and their positive statement of facts known to them, and because of which they testified that his habits were intemperate; confirmed by the testimony of his family physician, that in 1871 the assured was "drinking hard," that he had attended him that year for *delirium tremens*, and also at other times for indisposition from the "excessive use of intoxicating drink," should receive from the Jury greater consideration and in forming a conclusion have more weight than the opinions of other witnesses, who do not contradict those who have testified to the intemperate habits of the assured; but when they say that he was of temperate habits, can only be understood as so saying because they were not informed of the facts to which the witnesses have testified, who say that his habits were intemperate.

2. Because there was no evidence produced of any "exceptional indulgence," as the cause of the *delirium tremens*," which in Medical Science is the consequence of the continued and excessive use of alcoholic liquor. That "exceptional indulgence" was a term of the most vague and indefinite import; if limited to a single occasion there was no evidence of any such "exceptional" departure from the habits of temperance; if embracing more than a single occasion would affirm, that "exceptional" indulgences

ending in *delirium tremens*, were consistent with temperate habits: while the evidence so far from supporting the attack of *delirium tremens* as the consequence of an "exceptional indulgence," proved the fact of that delirium, and connected it by the family physician, not with any "exceptional," but with the excessive use of liquor.

3. Because his Honor the Presiding Judge, should have instructed the Jury that the fact of the assured having had an attack of *delirium tremens* in 1871, would of itself raise the presumption that it was the result of intemperate habits, unless in the evidence there was to be found the explanation which would repel that presumption. That the only evidence explanatory of the attack was that of the family physician, who referred it to the intemperate habits of the assured; that in the absence of any testimony in behalf of the assured, disputing the fact of the attack of *delirium tremens*, or the cause of it as other than the continued and excessive use of intoxicating drink, the fact of the attack and the cause of it being testified to by an expert, unless the character and credit of the family physician was impeached, would be conclusive of the question of the habits of the accused.

BRIEF OF THE POINTS OF LAW OR FACT DISCUSSED.

In Stitt *vs.* Hindekopee, 17 Wallace R., 384, this Court said: "It is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.

And in regard to the subject matter to which the rule is applicable, this Court has said in Jeffries *vs.* The Life Insurance Company, 22 Wall. 47: "The statements and declarations made in the policy shall be true," * * * if he makes any statement in the application it must be true," * * * if he makes any declaration in the application it must be true." "A faithful performance of this agreement is made an express condition to *the existence* of a liability on the part of the Company.

The question of the liability of the plaintiff rested upon the question of the truth or falsehood of the warranty, that H. H. Badenhop was, at the time of the insurance, one "of temperate habits, and has always been so."

In the Ætna Life Insurance Company *vs.* Trance, et al., 91, U. S. Rep., 510, this Court again said: "This decision is so recent and so precise in its application that it is not necessary to go back of it. It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of a Court or Jury by the agreement of the parties that such statements are absolutely true, and that if untrue in any respect the policy shall be void."

In this case the defendants denied any liability upon several grounds.

Of these it is not necessary at this time to consider any other than this: that the statement of the assured that he was and had been a man of temperate habits was untrue. And this being so, the contract is void.

To sustain this defence, the testimony of Dr. F. M. Robertson, the family physician, at the time when the insurance was made, was produced, who, in 1871, treated the insured for *delirium tremens*, and knew his habits to be intemperate, and his testimony corroborated by two other disinterested witnesses; and they established the fact that the assured was a man of intemperate habits.

To prove that the assured was a man of temperate habits four witnesses were introduced, one of the four being the defendant in error.

The case then stood upon the testimony of the family physician, he testifying positively as to facts, one of which was an attack of *delirium tremens*; and sustained by other witnesses, and to these was opposed the four witnesses named.

The Presiding Judge refused to charge that there was any preponderance of testimony on either side; and the refusal to charge as he was asked, brings the case here.

The importance of instructing the jury as to the degree of credit to be given to the two classes of witnesses is forcibly seen in the case of Dr. Robertson, the family physician, testifying as such to the habits of the assured, and specially in regard to the attack of *delirium tremens*; a fact in all its bearings relating to medical science.

Dr. Robertson testifies as to the fact, that he attended H. H. Badenhop for *delirium tremens*.

The Presiding Judge charged the jury, that "if the jury find that the habits of H. H. Badenhop in the usual ordinary and every day routine of life were temperate, then such representations were not untrue within the meaning of the policy, although the jury may find that the assured had an attack of *delirium tremens* resulting *from an exceptional indulgence* in drink prior to the issue of the policy."

There is nothing in the evidence that gives the slightest warrant for this hypothetical statement of the case.

Dr. Robertson says he attended the assured in 1871 for *delirium tremens;* that in 1871 he was drinking hard; that once or twice he was indisposed from the excessive use of intoxicating drink; regarded him as a man of intemperate habits.

Not a word escapes the physician as to this *delirium* from "exceptional indulgence in drink."

But "*delirium tremens*" is not reconciliable with "exceptional indulgence" in drink. *Delirium tremens* is the consequence, not of "exceptional indulgence," but of confirmed and continued habits in the excessive use of alcoholic drinks.

In Woods practice of medicine, (Vol. 2, p. 774), and classed as of the highest authority on all medical subjects, the learned writer says: the essential cause of the species of *delirium* is the suspension of a stimulas to which the brain has become accustomed. In order that it may be produced, there must have been a certain continuance of the previous stimulation, so as to have formed a cerebral habit. Hence the steady tiplars who always keep themselves under the influence of alcohol, without ever being absolutely intoxicated, are more liable to the disease than the occasional

drunkard who commits a debauch now and then, but allow intervals in which the brain may emerge from under the effects of the poison, and to acquire its healthy state.

In Dr. Atkins great work on "The Science and Practice of Medicine," (Vol. 1, p. 770), the writer thus defines *delirium tremens:* "A train of morbid phenomena, produced by the slow and cumulative action of alcohol in the various forms in which it is used as a drink.

Dr. W. B. Carpenter, in his treatise on the use and abuse of Alcoholic Liquors, says: "In fact this terrible state is the manifestation of the disordered condition to which the brain has been bronght by habitual excess, and plainly exhibits the complete perversion of its functional power and of its nutritive operations," (p. 42).

All the matters connected with it, belong to the Science of Medicine. And it is therefore to the Science of Medicine we must refer for the information which is to guide us to our conclusion.

The Medical authorities which have been cited, leave no doubt of the conclusion, that *delirium tremens* pre-supposes a continued and excessive use of liquor as a stimulant. "That it may be produced, there must have been (says Dr. Wood) a certain continuance of the previous stimulation, so as to have formed a cerebral habit." It is produced says Dr. Atkin's "by the slow and accumulative action of alcohol in the various forms in which it is used as a drink."

It is the result of a habit, that habit the "continued and excessive use of liquor as a stimulant." And that use inconsistant with and contradicting the statement that *delirium tremens* is exhibited in the case of a man of temperate habits.

But such is the charge which the Judge gave to the Jury. It is a fact that in 1871, the assured had *delirium tremens*; it is a fact testified to by his family physician that he was in 1871, drinking hard; it is a fact that the same physician treated him at other times for indisposition produced from the excessive use of intoxicating drinks, and other witnesses corobo-rate the habits of drinking to which the physician has testified. Nevertheless, according to the charge so given, as other witnesses testify to their opinion, that the assured was a man of temperate habits, the charge left it to the jury to conclude that the assured was a man of temperate habits, and being so, the jury might further conclude that the attack of *delirium tremens*, was the result of "an exceptional indulgence in drink prior to the issue of the policy."

There was not any evidence of "exceptional indulgence" at the time of this attack, or at any other time. The evidence on the one side was positive as to "continuous indulgence;" on the other side, that in the opinion of the witnesses the assured was a man of temperate habits. The most pronounced of these was the defendant in error, the party who claims this insurance, who says he saw him "every day or every other day during 1871, never saw him under the influence of liquor;" although it was during this time that he was under treatment for "*delirium tremens*," and his physician says was "drinking hard." It was upon this evidence on the one side and the other that a hypothetical case of "exceptional indulgence"

was given to the jury, to account for an attack of *delirium tremens*, which in medical science is "produced by the slow and cumulative action of alcohol in the various forms in which it is used as a drink," and to produce which "there must have been a certain continuance of the previous stimulation so as to have formed a cerebral habit."

The fact then established, as it was by the positive testimony of Dr. Robertson, of the assured having had an attack of *delirium tremens*, in 1871, with his testimony as to his habits in 1871, and the early part of 1872, makes proper the consideration of the case with that light which medical science throws upon it. And the weight derived from this has been recognized by this Court in the case of the Ætna Life Insurance Company *vs.* Frank, 91 U. S. R., 510. In that case this Court held the charge of the Judge to be erroneous, because "it left to the decision of the jury, and under circumstances of much embarrassment, a question which the parties had themselves determined. An ordinary jury of twelve men, without the aid of experts, are poorly qualified to determine a question of medical science." It was held by the Court that submitting to the jury the question whether because the insured walked, worked, danced and bathed without fatigue, having had hernia or not, his health was not impaired, "is to impose a great strain upon the powers of a jury;" and "facts and circumstances" explanatory of the physical condition of the assured, the effect of which would be to take away the materiality of the denial of the assured, "should not have been given to the jury for their judgment."

In this case there was presented to the Court, as a leading fact, that in the year 1871, the party insured had an attack of *delirium tremens*.

Medical science then must be resorted to, to ascertain what is *delirium tremens*.

What it is in itself, and from what cause produced, has been stated on the highest medical authority.

And that cause the excessive use of intoxicating drink.

In the case of this person, that family physician speaks of him as "drinking hard;" attending him because of indisposition from the excessive use of intoxicating drink," and that he regarded him as of "intemperate habits."

The question to be truly answered is this: "Is the party of temperate habits? Has he always been so?" The answer given is, "Yes."

In the application for insurance the applicant refers to Dr. F. M. Robertson as his family physician.

This family physician referred to in the application is not the physician examined.

Another gives a certificate.

Is that answer, so given, true? If Dr. Robertson has spoken truly, did the assured answer truly?

Does the verdict of the jury make it so?

We are not now asking the Court to review a finding of fact in an issue before a jury, with proper instructions from the Court.

We are not asking whether the verdict of the jury can be reconciled with the instruction given by the Court.

But we do ask that this Court will say whether the instruction so given was proper?

Whether, with that instruction, the jury were properly guided in the determination of the relative weight of the testimony on either side?

Whether, if the jury had been properly instructed, the verdict rendered could have been given?

Or, if given, would it not have been set aside?

To give the verdict as rendered, the jury must have acted on the case presented by the Judge.

The case presented by the Judge was one which was not before the jury, testified to by any witness.

And, therefore, when the Judge submitted to the jury that the attack of *delirium tremens* may have resulted from an "exceptional indulgence" in drink, he in that presented a case wholly hypothetical.

But if *delirium tremens* could be produced from "exceptional indulgence," that "exceptional induldence" cannot be presumed to have existed, if, in a case of "*delirium tremens*," the cause of it in medical science is continued and excessive use. The fact, therefore, of *delirium tremens* carries with it the presumption of continued and excessive use of drink; and the *delirium tremens* being proved, the law will presume from that a continued and excessive use; unless if in any case it can be produced from "exceptional indulgence," that "exceptional indulgence" is established to disprove the presumption which would otherwise arise of continued and excessive use.

And so it appears that the charge in the case did "impose a great strain upon the powers of a jury;" leading it to speculate upon a matter which was not in proof, but was disproved by positive testimony; and in that speculation were allowed to raise a presumption, which could not arise from any fact in the case deposed to by any witness; and was disproved by the positive testimony of all the witnesses who spoke or could speak of the facts in the case.

That the Judge should have charged the jury that an attack of *delirium tremens* having been established, medical science giving as the cause continued and excessive drinking, that cause must be presumed to exist, unless disproved by some other sufficient cause for it; would seem too plain for doubt. That in this case "exceptional indulgence;" if alleged as the cause of the attack could not be presumed, but must be proved; and was in oppo-

sition to the conclusion in such cases of medical science; that being so, an exceptional case, must be strictly proved; that in this case it had not be so proved; of it no proof was attempted; and if offered, it could not prevail against the testimony of Dr. Robertson, unless that testimony had been impeached and discredited; is also too plain for doubt. "The evidence of Dr. Clark was not a mere declaration of a third party, but the testimony of an expert as to the facts founded upon his own observation and examination." (Mulliner *vs.* Guardian Mutual Ins. Co., I Bigelow's Life & Accident Ins. Rep., 268.)

In Hutton *vs.* The Waterloo Life Assurance Company, 3 Bigelow Life and Accident Insurance, Rep. 199, (1 Fost and F., 735), Cockburn, Ch. J. submitted to the Jury four questions, the 2d of which was: "had he had *delirium tremens* or any disease tending to shorten life, or made the assurance more than usually hazardous," and the verdict was for the defendant, on that and another question. A circumstance in that case now cited and commented on, appears also in this; that the medical man who attended the insured before the policy, was not the ordinary medical attendant of the insured; and he who did sign the certificate stated that he made his report mainly on the answers of the assured, that he appeared healthy and did not betray any symptom of drinking.

In these cases it is not the materiality of the question and its answer which is to be considered, it is simply the truth of the answer to the questions propounded.

And the truth of the answer is only, established by the verdict if that verdict is sustained by testimony submitted to the Jury, with such directions as will enable it to be interpreted according to the established rules of evidence. And the answer is not true which would make the habits of the insured that "of a man uniformly and strictly sober and temperate," or "did not amount to habitual use of such drinks as beverage."

The proper test to be submitted to a Jury in such cases is, whether the habits of the insured at the time of the insurance, "were and had been uniformly strict and sober, or whether he did not habitually use intoxicating stimulus as a beverage?" If, said the Court, the answer to either question be untrue, there cannot be a recovery on the policy, although the party did not intentionally make false answers and his habits did not in fact cause, hasten or contribute to his death. May's Insurance, p. 331. Swick *vs.* Home Life Insurance Company, before Dillon & Treat, J. J., 2 Dillon's C. C. Rep., 160.

In considering the best test to apply in a question of habits, that to be found in an attack of *delirium tremens*, when the family physician testifies to indisposition at other times, proceeding from the excessive indulgence in the use of intoxicating drinks, should have been presented to the Jury, if uncontradicted; as proof conclusive that the answers in the application were untrue: because any general testimony of his acquaintances as to his habits were in the first place only their opinions, which would not prevail against the facts deposed to by the family physician, particularly when we do not know what amount of indulgence, in their opinion, would constitute the habits of one whom they would consider intemperate.

In support of the defence, the witnesses were impartial, disinterested. The chief witness, Dr. Robertson, spoke not only with the certainty of actual observation, but with the authority of an expert. And his observation was confirmed by two other witnesses, who testify as to what they saw. They knew the insured, saw him frequently under the influence of liquor; knew him to be an intemperate man.

On the other side the defendant in error, who claims this insurance, and is the most positive in his statement, testifies that he saw him in 1871, every day or every other day, and never saw him under the influence of liquor. And Dr. Reentzjera says he was the family physician, with the assured, in his statement, refers to Dr. Robertson as his family physician.

CONCLUSION.

The true rule, and that for the application of which we ask in this case, is laid down in Mills *v.* Smith, 8 Wall. R., 27: "If the Court below have given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in this Court for any supposed mistake of the jury."

We submit that the Court below did not give "proper instructions."

The single and simple proposition submitted to the Court, had for its correctness the authority of this Court.

In this case that was done, which, in the case of The Ætna Life Insurance Company *vs.* Frank, this Court said "is to impose a great strain upon the powers of a jury," and one which "should not have been given to the jury for their judgment."

And it is for this that this Court is now asked to send the case back for trial, with such instructions as properly should be given to the jury.

A. G. Magrath

Counsel for Plff in error

UNITED STATES OF AMERICA
SUPREME COURT.

OCTOBER TERM, 1881.

No. 212.

THE KNICKRBOCKER LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

vs.

BARTHOLOMEW FOLEY, DEFENDANT IN ERROR.

ARGUMENT FOR DEFENDANT IN ERROR.

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CHARLESTON, S. C.
WALKER, EVANS & COGSWELL, PRINTERS.
Nos. 3 Broad and 109 East Bay Streets.
1881.

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THE KNICKERBOCKER LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR, *vs.* BARTHOLOMEW FOLEY, DEFENDANT IN ERROR.

ARGUMENT FOR DEFENDANT IN ERROR.

The questions presented by the writ of error in this case are of two kinds. *First.*—Those arising under the general exception to the charge of the Court. *Second.*—The questions arising under the exception to the refusal of the Court to charge the propositions prayed by defendant. (the plaintiff in error.) 1

I. Those arising under the general exception to the charge of the Court.

By reference to Record (p. 24, folio 61) it will be seen that "the counsel for the defendant before the jury had withdrawn from the bar, *did except to the charge so given.*" The charge which consists of several propositions of law, is set forth at pp. 23–24, folios 60–62.

The record discloses no exception to any specific and separate proposition or propositions contained in that charge. The exception is, in the words thereof of record, "*to the charge so given.*" 2

Now, before going into the discussion of the legal propositions of the charge, we submit as a preliminary objection, which is fatal to this general indefinite exception to the charge, the uniform rule of this Court, that, in case if any one of the propositions of the charge be correct, and sound in law, then the exception must be overruled. This Court has repeatedly announced, and has at the last term reaffirmed this principle. 3

The ruling that where any portion of the charge to the jury is correct an exception to the entire charge will not be sustained, reaffirmed—

Boogher *vs.* Insurance Co., XIII Otto, 90–98, where citing *Johnston vs. Jones*, 1 Black, 209; *Rogers vs. Marshal*, 1 Wall., 644; *Harvey vs. Taylor*, 2 Wall., 328; *Lincoln vs. Claflin*, 7 Wall., 132; *Beaver vs. United States*, 93 W. S., 46; this Court say: "We have uniformly held that 'if a series of propositions is embodied in instructions to the jury and the instructions are excepted in a mass, if any one of the propositions is correct the exception must be overruled.'"

If, therefore, any one of the several propositions of the charge (which we discuss below) is correct, the general exception "*to the charge so given*" must be overruled. The "charge so given" consists of several distinct legal propositions and we will discuss them in order.

FIRST.—"*If the jury find from the evidence that the defendant Company issued the policy of insurance upon the life of H. H. Badenhop, offered in evidence, by which it is agreed to pay upon his death the sum of money stated therein, and find further from all the evidence in the cause that the assured since died, then the plaintiff is entitled to recover such insurable interest as he had in the life of the assured, not exceeding the amount of the policy. Unless the jury find from the evidence that the assured, in his application for the policy, made representations to the Company or its agents which were untrue in some respects, or by some act of his after its issue avoided the same.*" (p. 23, folio 60, Record.

The uncontroverted facts bearing upon this proposition are set out in Bill of Exceptions, p. 19, folios 47, 48, *i. e.* "The plaintiff, to maintain the issues on his part, proved the issuing of the policy by the defendant Company, the death of the insured on 11th January, 1875, and the interest of the plaintiff in the life of the insured." We submit the correctness of this proposition of the charge without argument.

SECOND.—"*But the jury are instructed* that if they find *from the evidence that the assured disclosed the true nature of his business to the agent of the Company who wrote out his application and called him therein or classified him as a*

" " *merchant," the Company is so estopped from calling that*
" *allegation false.*" P. 23, folio 60.

The undisputed facts bearing upon this proposition are set out in the bill of exceptions, p. 19, folio 48, and p. 20, folio 51. Record ,as follows, in the testimony of Hutson Lee, agent of the Insurance Company, " that he (the agent) had
" made out and submitted the application," " that H. H. Baden-
" hop disclosed the nature of his business to him (the agent)
" at the time of the application, saying that he kept a bar and 8
" restaurant and sold liquors by the bottle and five gallons.
" That thereupon witness classified H. H. Badenhop as a
" *merchant,* and that witness knew the facts disclosed as re-
" gards his business were true."

These being the facts in the record, we will submit the correctness of the proposition of the charge, as sound law upon the explicit and recent authority on this very point, decided by this Court in a similar case. (New Jersey Mutual Life Insurance Company *vs.* Baker, iv. Otto, 610.) The Court say: 9

" It is manifest upon the testimony of the witnesses that
" Dr. Wells, the agent of the Company, undertook to con-
" strue and interpret the answers of the applicant and wrote
" down and inserted in the application his construction and
" interpretation of them and not the answers themselves.
" * * * The statement was one prepared by the Com-
" pany, for which it was responsible and it cannot be set up
" to defeat its policy. *The Insurance Company vs. Mahone,*
" 21 Wallace, 152, is a full and satisfactory authority to this
" point, as is also *The Insurance Company vs. Wilkinson,* 13 10
" Wall., 222, In the former case the opinion was given by
" Mr. Justice Strong, and in the latter by Mr. Justice Miller,
" and each of them contains a full and careful consideration of
" the precise question before us. These cases are so recent
" and so fully in point that further discussion is unnecessary."
The New Jersey Mutual Life Insurance Co. *vs.* Baker, IV. Otto, 610.

Third. "*The Jury are instructed that all the representations in*
" *the application for the policy of insurance are warranties that* 11

" such representations are true, and if the Jury find from the " evidence that the habits of the assured Badenhop, at the time " or any time prior to the application, were not temperate, then " the answer made by him to the question " are you a man of tem- " perate habits ?" Have you always been so ? were untrue and " the policy void.

The correction of this proposition we will not discuss; for the same in substance was prayed as an instruction by the
12 plaintiff in error, himself, in the Court below. It is contained in the first instruction prayed by the Insurance Company at p. 16, 17, folios 41 and 42 of record, and based on numerous decisions of this Court therein cited.

Fourth. " But if the Jury find that the habits of H. H. " Badenhop in the usual, ordinary, and every day routine of his life " were temperate, then such representations were not untrue " within the meaning of the policy, although the Jury may find " that the assured had an attack of delirium tremens, resulting
13 *" from an exceptional indulgence in drink prior to the issue of the " policy,"* p. 23, 24, folio 61.

The issue made by defendant being upon a *question of habit,* and the evidence indicating only a single attack of delirium tremens, the soundness of this proposition is founded on the highest authority.

" *Delirium tremens* may be the immediate effect," says Dr. Ray, " of *an excess* or series of excesses in those *who are not " habitually intemperate,* as well as in those who are." *

14 Wharton's Criminal Law, vol. I, Sec. 33.
Ray's Medical Jurisprudence, p. 438.

Fifth. "The burden of proof is upon the defendaunt (Insurance Company) to show the breach of any warranty in the policy."
Judge's Charge, p. 24, folio 61.

We submit the correctness of this distinct proposition of the charge upon the authority of the case or *Piedmont, etc. Life Insurance Co. vs. Ewnig, Administrator,* 92 U. S., 377, recently
15 decided by this Court. We produce the words of the Court

* See to same effect. *Lectures on the Principles and Practice of Physic,* by Sir Thomas Watson, M. D , F. R. S , Kings College, London, p. 253, 254, 2d Amer. Ed., Phil., 1845.

Dict. of Practical Medicine, James Copland, M. D., F. R. S., Vol. I., p. 573, Title, "*Delirium Tremens.*"

Encyclopaedia Brittanica, (9th Ed), Vol. VII., p. 45 " *Delirium Tremens.*"

in that case, in this argument, at page 15, to which we ask reference.

We think therefore that it clearly appears

1. That the charge of the Judge properly submitted the case to the Jury by a series of propositions, all of which were sound in law.

2. That even if it be allowed for the sake of argument, that 16
any one or more of the propositions of the charge be unsound in law, even then, others being sound, the Court will overrule the general exception "to the charge so given" on the established principle repeatedly decided by this Court that if one of the propositions in the charge in such case is correct, the exception will not prevail.

In either case this Court will overrule the exception.

17

II. The exception of plaintiff in error to refusal of the Court below to charge the instructions prayed:

Having dealt with the exception to "*charge so given*," there remains the exception: "*That the Presiding Judge did "refuse to charge the jury as prayed for in the fifth and sixth "instructions asked for by the counsel for the defendant.*" (Folio 61, p. 24.)

It appears from the Bill of Exceptions, p. 23, folio 59, "*that the Presiding Judge, being the Circuit Judge, declined to "give the instructions as prayed for by the counsel for the plain-* 18
"tiff and by the defendants, but did charge the jury as follows," *&c.*

It is therefore of record that "*the defendants prayed for the "following instructions*" (folio 55), and that "*the instructions "as prayed for by the counsel for the defendant were refused.*" (Folio 59.) These instructions were six in number, and are set forth at pp. 22, 23, folios 56-59, of Record. They were presented as a whole, and rejected as a whole.

To the exception of the plaintiff in error, therefore, we in- 19
terpose the preliminary objection, which is fatal to it, under

the decisions, that, in the language of this Court, "According " to the well settled rule of this Court, if either of these six " (four) propositions was erroneous, or in other words, *if all " the charge thus asked was not sound law*, the Court did right " in refusing the prayer which presented them as a whole. " See *Johnson vs. Jones*, 1 Black., 209; *Harvey vs. Tyler*, 2 " Wall., 328; *Lincoln vs. Claflin*, 7 Wall., 132; *Beaver vs. Tay-* " *lor*, 93 U. S., 46; *Worthington vs. Mason*, 101 U. S., 149."

20 United States *vs.* Hough, XIII Otto, 72.

This principle being established, it is clear that the Court below was not in error in refusing the instructions as prayed, for, to take no other instance, it is very evident that the third proposition is not sound law in this case. It is as follows:

" That when in answer to the fourth question concerning " the *occupation* of the party whose life was sought to be in- " sured, the answer given was that of a '*merchant*,' *the jury* " *must decide* whether that answer did truly describe to the

21 " insurer the real occupation of the party whose life was " sought to be insured, so that the insurer became truly in- " formed of his occupation." (Folio 58, Record.)

This was clearly error, for to make the question of "*real occupation*" one for the jury as a determining issue of the cause, after the agent of the Insurance Company had, upon full disclosure of the applicant of the nature of his business, classified him as a "*merchant*," was in direct conflict with the principle thrice adjudicated by this Court in the cases, heretofore referred to, of *The New Jersey Mut. Life Ins. Co. vs.*

22 *Baker*, IV Otto, 610; *The Insurance Co. vs. Mahone*, 21 Wallace, 152; *The Insurance Co. vs. Wilkinson*, 13 Wall., 222, in which this Court held that the Company was bound by the act of its agent, and estopped from denying the correctness of the answer in the application in such case.

If this third instruction prayed be wrong, as it clearly is, then we submit that the refusal of the Court below to charge the instructions prayed as a whole was proper; and the exception to the refusal to charge will be overruled on the authority of

23 the cases cited above. *

* "The defendant asked for twenty instructions. The Court refused " to give any of them. To both the *refusal* and the *giving* the defendant " excepted. *When instructions are asked in the aggregate, as were those of the* " *defendant, and there is anything exceptionable in either of them, the whole* " *may be properly rejected by the Court.* The were several things of this " character in those in question. *It is sufficient to refer to one of them.*" *Indianapolis, etc., R. R. Co.* vs. *Horst*, III Otto, p. 295.

If we consider the specific instructions, the fifth and sixth, as prayed by defendants and refused, and to which special exception is directed, we find them equally untenable.

The fifth instruction prayed and refused was:

"That where in a question whether the party assured is one "of temperate habits at the time when he seeks to be insured, "and has always been so, witnesses testify from their *own* "*knowledge* of the party, and *his habits*, that *he was not of* 24
"*temperate habits*, their testimony is entitled to greater con-"sideration by a jury than witnesses who testify *otherwise*, "because they have not seen or known of such habits as are "testified to by those who declare that he was not a person "of temperate habits."

Now the chief errors in this instruction are (1) that it assumes facts which are not in the record; and, again, (2) that as it was a philosophical abstract proposition, the Court was not bound to charge it; (3) as proposition of law it is not *properly* 25
qualified, and, as it stands, is not sound law. For all of these reasons, or because of any one of them, the Court below was right in refusing to embody it in the charge.

First. It assumes facts which are not in the record. In the language of this Court:

"Counsel cannot, in their requests to the Court, assume "the existence of facts, and ask a charge thereon; nor upon "argument in this Court, insist that because this assumption "was made, the Court is to consider the assumed fact as ex- 26
"isting."

N. J. Life Ins. Co. *vs.* Baker, 94 U. S., 610.

"A prayer for instructions which assumes as existing matters "of which no proof is found in the record, and which are sim-"ply *inferred* to be facts by counsel making the prayer, ought "not to be granted."

R. R. Co. *vs.* Gladmon, 15 Wall, 401.

This is settled law, and it is clearly violated in this fifth in- 27
struction prayed.

In the instruction we find the words: "Where in a ques-
"tion whether the party assured is one of temperate habits
"*at the time when he seeks to be insured, and has always been*
"*so*, witnesses testify from their *own knowledge* of the party
"and *his habits* that he was not of temperate habits."

In the Bill of Exceptions we do not find any facts stated as evidence upon which this could be posited. Dr. Robertson
28 was the *only witness* for the defendant that testified as to *any time* of any *acts* of intemperance, he placing it before the issuance of the policy, and even he "*did not say the answer* (made by Badenhop in application) was *untrue*," but, deeming it a matter of opinion and inference, and not of fact, "HE *regarded* him as of intemperate habits." (Folio 50.) He no where swears he *knows his habits*, and on cross-examination it appeared that "he did *not know Badenhop intimately;* had no "relations with him other than professional, and met *him oc-*
"*casionally* on the street." (Folio 53.)

29 The only other witnesses for defendant, F. W. Pieper and John H. Ostendorff, (whose testimony is at folio 50,) although they testify to acts of intemperance, *fix no time* of that intemperance. It may, therefore, have been after the issue of the policy, and therefore irrelevant.

And none of the witnesses above mentioned swear they *knew his habits*, (folio 50.)

It appears, therefore, that the counsel has assumed in the instruction the existence of facts which do not appear in the record, in stating:

30 1. That *witnesses* testified "that he was not of temperate habits at the *time when* he sought to be insured, and had *always been so*."

2. And this, from their own *knowledge* of the party and *his habits.*

Again, we find in this fifth instruction further assumption of fact in the words: "Their testimony is entitled to greater
"consideration by a jury than witnesses *who testify otherwise,*
"*because they have not seen or known of such habits as are testi-*
"*fied to by those who declare that he was not a person of temper-*
31 "*ate habits.*"

The assumption here for which nothing equivalent is found in the record is that the six witnesses who testified that he was of temperare habits, so testified simply because they had not seen or known of intemperate habits; and there is a repetition of the former assumption that the witnesses for defendant declared that he was not a person of temperate *habits.*

It is necessary to refer briefly to the testimony of the six witnesses for the plaintiff, in order to give its precise force. 32

Hutson Lee, agent of the Insurance Company, testified that at time of issuing policy, (January, 1872), Bandenhof was in perfect health, and was as good a risk as he ever took.

" That he had known H. H. Badenhof *several years previous* " *to the time of the application; regarded him a man of temperate habits.*" (folio 51).

" *B. Foley*, knew Badenhop for fourteen years; saw him " every day or every other day in 1871. *Knew his habits; he* " *was a man of temperate habits.* He lived in *witness house* in 33 " latter part of 1871, and part of 1872, (folio 52)."

Dr. T. Reentsjerna, testified that he was the family physician of Badenhof for twelve years. Knew Badenhop intimately for twelve years. Knew him in 1870, 1871, 1872. *Knew his habits.* He would say he was a man of temperate *habits.*" (folio 52).

W. Gorman, testified he knew Badenhop for ten years. He was his co-partner in 1869, and 1870; for 14 months as co-proprietor of Columbia Hotel. He was a steady man; *knew* 34 *his habits;* he was a man of temperate habits, (folio 53).

William Luders, knew Badenhop fourteen years; *knew his habits;* he was a man of temperate habits; knew him 1870, 1871, 1872, (folio 53).

Dr. Charles Brown, knew him intimately nine years, regarded him a man of temperate habits, (folio 54).

This was in brief the testimony of the plaintiff's witnesses who rebutted the testimony given principally by Dr. Robertson 35

for Insurance Company; and all of it makes a direct issue of fact and opinion with the evidence given for the defendant.

On both sides the testimony is direct and positive, and mutually exclusive. It cannot be explained away as is sought in the assumptions in the instructions prayed, as negative testimony.

There is nothing in plaintiff's testimony to warrant any such statement or inference as contained in the instructions. They
36 no where say that as far as we know he was of temperate habits; they no where admit that he might have been of intemperate habits, and they not know of it. Their testimony is direct as to *time*, naming the years; it is direct as to a personal, intimate, daily intercourse with him. It is in every instance direct as to *knowledge* of his *habits*; and a knowledge that those *habits* were temperate. There is nothing negative in their testimony; it is affirmative and explicit throughout, and excludes the idea that without their knowledge, intemperate habits could exist.
37 The nearness of their professional and personal relation to him, gave them special and continued opportunity for observing and knowing; and *habits* being not isolated occurrences but a series of repeated occurrences, periodically taking place the absence of them sworn to by those in a position to see and know and on the watch, is as affirmative in its nature and entitled to as much, if not more credit, as testimony by those who, not so constantly near him, testify not to the knowledge of intemperate habits, but only to isolated *acts of intemperance*, and to an *opinion* that he was of intemperate habits.
38

We say therefore that this instruction contains assumptions and inferences of fact in the several particulars mentioned, not found in the record; and to have given it would have been error under the cases cited.

2. Again, the instruction in its unqualified form is not sound law. It may be true ordinarily "that the testimony of a "*credible* witness that he saw or heard a particular thing at a "particular time and place, is more reliable than that of an
39 "*equally credible* witness, who with the *same opportunities*,

" testifies that he did not see or hear such thing at such time
" and such place."

Wharton on Evidence, § 415.
Stitt *vs.* Hindekopers, 17 Wall, 384.

But this proposition, as quoted, is limited by the insertion of the two material elements of *equal credibility* of the witnesses, *i. e.* equal in intelligence, memory and truthfulness, and by that 40
vital element *equal opportunity of observation*. Now to announce a proposition, as this instruction prayed does, without the qualification of *equal credibility* and *equal opportunities* of the witnesses, is to disregard the *vital limitations* as to the rule of evidence. Stated without those limitations the rule is not sound law.

If this be so as to *one* particular event at a particular time and place, *a fortiori*, how much more vital is the qualification when the question is not as to an isolated fact or a single event, but is as to a series of occurrences, so often repeated, 41
as to constitute *habit*. Now what does this word *habits* mean in this policy?

In the language of Swick *vs.* Home Insurance Co., 2 Dillon, 164: "These questions and answers you will perceive
" relate to the *habits* of the party in that respect. If the
" Company did not intend to insure any person who used in-
" toxicating liquors at all, it would be very easy to ask such
" a question. *But they have not done so.* The occasional use
" of intoxicating liquors by the applicant would not make
" these answers untrue." 42

And again in Holterhoff *vs.* Mutual Benefit Life Insurance Company, 4 Bigelow, Life, etc., Ins. Rep., p. 416, the Ohio Courts held the following charge correct: "A habit then as
" generally understood, and as defined by lexicographers is a
" disposition or condition of the mind or body—a tendency
" or aptitude for the performance of certain actions acquired
" by custom or a frequent repetition of the same acts. Habit is
" that which is held or retained—the effect of custom or fre-
" quent repetition." (p. 407.)

The question of habit is therefore one of frequent repetition 43
of the same acts, and in this policy it become one of *frequent*

repetition of *intemperate* acts. It is not one of intemperance simply on any single occasion, but it is one of frequency and repetition of acts of intemperance *sufficient to amount to a habit.*

In the language of the Supreme Court of Ohio, in The Union Mutual Life Insurance Company *vs.* Rief, January
44 Term, 1881: (*Ins. Law Journal*, p. 431.) "An occasional ex-
" cess in the use of intoxicating liquor does not, it is true, con-
" stitute a habit or make a man intemperate within the mean-
" ing of this policy." (*Idem*, p. 432.) "Where the general
" habits of a man are either abstemious or temperate an
" *occasional indulgence to excess* does not make him a man of
" intemperate habits."

Now, if the frequent repetition of the occurrences is the vital element of habit; then in this case the opportunities of the witness for observation is primal in determining his
45 capacity to speak and the weight of his evidence.

In this case, the reason of the qualification of the rule is strikingly manifest. The agent of the insurance Company, a man by his profession on the alert to detect men of *intemperate* habits, testified that he was of *temperate habits*, and that he knew him for several years previous to the application for insurance. B. Foley lived in the same house with him and saw him every day or every other day in 1871, (the year Dr. Robertson *thought* (he did not *know*) he was a man of intemperate habits) and Foley swears he knew his habits and
46 that he was of *temperate habits*. Dr. Reentsjerna, his family physician, (except in cases of his wife's confinement) for twelve years, swears he knew his *habits;* and he was a man of *temperate habits*. Gorman, his co-partner in business, and Luders his intimate friend, and Dr. Charles Brown, all swear to knowledge of his habits and that they were temperate. (Folio 51–53. Here are six witnesses of *special and continued opportunity* for observation because of their close, personal, professional and *business relations* to the assured. On the other hand Dr. Robertson, witness for defendant, was an exceptional
47 medical attendant, and even on what *he* saw, he would not swear he was a man of intemperate *habits*, but only that he "*regarded*" him so; being careful to give an *inference* and *opinion*, not a *positive* fact. And the other two witnesses,

without special opportunity, testified generally, without naming time or place, to isolated acts of intemperance. And *none* of these three witnesses (Robertson, Pieper and Ostendorff) ventured even to swear that they *knew his habits*, or that they were in a position to know his *habits*, or that his habits were, as matter of *fact*, intemperate (folio 50.)

Such being the case, the *opportunities* of observation of these respective witnesses was a vital element on the question of *habit;* and it follows that the general unqualified proposition 48
of the fifth instruction, was erroneous; and as a matter of law was in that shape, rightly refused by the Court below.

III. Again this fifth instruction is objectionable because it is an abstract, philosophical proposition, not applicable to the testimony contained in the bill of exceptions.

In the case of *Walker vs. Johnson*, 96 U. S., p. 428–429, this Court passed upon a similar question where an abstract 49
proposition was quoted from Greenleaf's Evidence and prayed as an instruction. The Court said in that case. "There is "nothing in the testimony, as we find it in the bill of excep- "tions, to which such a charge could apply. * * * * Be- "sides it is apparent (as it is here) that the attention of the "jury was directed by the Court to all the matters essential "to their understanding the case; and we do not admit that "a Court is bound to give to the jury, at the instance of "counsel, every philosophical remark found in text-books of "the law, however wise and true they may be in the abstract, 50
"or however high the reputation of the author."

We submit, therefore, that against the fifth instruction as prayed there are three objections, each equally fatal to its maintenance.

(1.) That it assumes facts not appearing in the bill of exceptions.

(2.) That as a proposition of law, being without its qualifications, it is erroneous.

(3.) That it is abstract and philosophical, and not applicable to the testimony. 51

On these grounds it was properly refused by the Court below.

There remains now to be considered the error assigned for a refusal to charge the sixth instruction prayed by defendants below.

The sixth instruction prayed by the plaintiff in error was, "that to entitle the plaintiff to recover he must prove to the
52 "satisfaction of the jury that he had an insurable interest in "the life of the party insured to the amount claimed by him, "the death of that party, and the performance of every pre-"cedent, condition or warranty contained in the policy." (Folio 59, p. 23.)

The first proposition of this instruction, "that he must "prove to the satisfaction of the jury that he had an insurable "interest in the life of the party insured to the amount "claimed by him, and the death of that party" was substantially given to the jury in the charge of the Court below at folio 60, p, 23, in the words: "If the jury find from the evidence
53 "that the defendant company issued the policy of insurance "upon the life of H. H. Badenhop, offered in evidence, by "which it is agreed to pay upon his death the sum of money "stated therein, and find further from all the evidence in the "cause that the assured since died, then the plaintiff is entitled "to recover *such iusurable* interest as he had in the life of the "assured, *not exceeding the* amount of the policy." The testimony as to the insurable interest and death, is at p. 19, folio 48, that plaintiff proved the death of the insured on the 11th
54 January' 1875, and the insurance was effected on the life of Badenhop as security for the payment of promissory notes, aggregating five thousand dollars. This evidence as appears by the record, was *without contradiction*; and under it, the charge was substantially that prayed for in first clause of sixth instruction.

The second proposition of this instruction, "that to entitle "the plaintiff to recover, he must prove *to the satisfaction of* "*the jury.* * * * *the performance of every precedent condi-*"*tion or warranty contained in the policy*," is, we submit, not
55 sound law, and was fatal to the instruction, and the Court was right in refusing it.

In the first place the issue as made up in the pleadings so far as *warranties* were concerned, was by the *defendant company* itself in its answer, (at p. 13, folio 32, Record,) limited to two warranties, and the breach thereof. The words are, "and they do aver that the said plaintiff, and the said H. H. "Badenhop, did not make true and correct answers and state- "ments to *certain* questions contained in the application for "the said policy of insurance *in that*, &c. &c." Then the breach of warranty as to occupation (merchant,) and temperate habits is set up. (See Record, p. 13, folio 32.)

This being so, it was clearly wrong to ask the Court that the plaintiff must prove *every* warranty, *i. e.*, every answer to every question, in the application, true to *the satisfaction of the jury*· in other words, to prove a multitude of facts not in issue by the pleadings.

In the second place, the instruction prayed is objectionable, as being in direct conflict with the decision of the Court on this very point, whether it be directed to all the warranties, or only to the two warranties, the breach of which was set up in the answer. That it is for the defendant company, to aver the breach and prove the same to the satisfaction of the jury, and not for the plaintiff to prove the truth or performance of the warranty in such cases, is fully settled in this Court by the authority of *Ins. Co. vs. Ewing*, 92 U. S., 377.

The case is so directly in point and so conclusive, that we quote its material part at length:

"Another defence however, was, that the assured had in "his application in answer to the questions propounded to "him, stated among other things, that his habits of life were "correct and temperate, and had ever been so, and that he "had never habitually used ardent spirits to the extent of in- "temperance;" and in reply to the question, "are you sub- "ject to or have you had dyspepsia, diarrhœa, dysentery, dis- "ease of the heart, stomach, bowels, or any of the vital "organs?" answered, "no." The defendant alleges in his "answer to the declaration, that these answers were untrue.

"On this branch of the case, the argument of the plaintiff "in error, (the Ins. Co.,) is, that the burden of proving the "truth of these answers was, on the plaintiff below; and that

" if he failed to introduce satisfactory evidence on that subject,
" he could not recover. It is true that this Court holds that
" all these answers are warranties, if so declared by the terms
" of the policy; and if any of them, however immaterial to
" the risk, is shown to be untrue, the policy is void.

" The number of questions in this application which re-
" quires an answer, are from thirty to fifty in every case:
" They relate to matters occurring in childhood, or which
60 " concern the health or habits of the ancestors of the assured,
" and to other matters rather of opinion than fact, which it
" would be almost impossible to prove. To establish the
" truth of the answer would, in many cases, require the party
" to prove a negative. Take the points raised in the case.
" How can a man who has lived forty or fifty years prove that
" he has never had dyspepsia or a diarrhœa, or any disease of
" the heart or bowels? and how can he prove that his habits
" of life have always been correct, and that he never drank
" ardent spirits to the extent of intemperance?"

61 " While it may be easy enough to prove the affirmative of
" one of these questions, it is next to impossible to prove the
" negative."

" The number of questions now asked of the assured in
" every application for a policy, and the variety of subjects
" and length of time which they cover, are such *that it may*
" *be safely said that no sane man would ever take a policy, if*
" *proof to the satisfaction of a jury* of the truth of every answer
" were made known to him to be an indispensable prerequi-
" site to payment of the sum secured, that proof to be made
62 " only after he was dead, and could render no assistance in
" furnishing it. *On the other hand, it is no hardship, that, if the*
" *insurer knows or believes any of these statements to be false, he*
" *shall furnish the evidence on which that knowledge or belief*
" *rests. He can thus single out the answer, whose truth he pro-*
" *poses to contest; and if he has any reasonable grounds to make*
" *such an issue, he can show the facts on which it is founded.*"

" The Judge of the Circuit Court was, therefore, right in
" refusing to instruct the jury, that the burden of proving the
" truth of these answers rested with the plaintiff below."

63 Piedmont, etc., Life Ins. Co. *vs.* Ewing, adm'r, 92 U. S., 377.

In the light of the principle of this case, we submit that the *sixth instruction* was clearly wrong in asking that the jury be instructed that the "plaintiff must prove to the *satisfaction of the jury* the performance of *every warranty, &c.*"

If so, then the whole instruction as prayed was correctly refused, and the exception of the plaintiff in error cannot prevail.

This disposes of the exception to the refusal to charge the instructions prayed. * 64

In conclusion, we submit that, on the issues raised in the pleadings, the whole case was properly given to the jury in a series of propositions set forth in the charge; that each and every one of those propositions is sound in law, and the plaintiff's exception cannot prevail against any one of them; and that even if any one of them be held unsound, then the others, or any one of them, being sound, this Court will overrule the general exception "*to the charge so given.*" 65

That as to the exception to the Court's refusal to charge the instructions or any of them prayed by the plaintiff in error, the same objection is fatal; that upon any one of them being found unsound, this Court will hold good the ruling that refused them as a whole. And that the instructions so prayed, except when substantially embodied in the charge below, were unsound in law, especially the third, fifth and sixth instructions prayed by the Insurance Company, and were properly refused.

That upon the whole case there is no error in the Record, and the judgment of the Circuit Court should be affirmed. 66

BRYAN & BRYAN,
J. N. NATHANS,
Attorneys for Defendant in Error.

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* This case has heretofore been argued on the assumptions (1) that an application was made and presented by the assured to the Insurance Company, as the basis of its policy of insurance (2) and that this application contained certain questions, and answers, the truth of which were warranted, (3) that in this application among others were the questions and answers set out in the answer, as to which breach of warranty was alleged therein, (4) that the policy referred to *this* application, and (5) that *this* application referred to the policy, 67

These *assumptions* are all on the special matters set forth in the answer as a defence, namely, a warranty and breach of warranty; and the burden of proving their truth rested upon the Defendant Company (as we have seen.)

Now if we turn to the Record we find in the Bill of Exceptions, pp. 19-24 folio 47-62, stating the evidence at trial, no
67 proof by Defendant Insurance Company of these material matters.

The record is absolutely silent as to them. The facts upon which the request to charge are to rest, do not appear there. And in such a case this Court has said they could give them no consideration.

It is sufficient to quote the language of this Court in a recent case directly in point on the very same question:

"It will not do for counsel, in request to the Court, to as-
" sume the existence of facts and ask a charge to the jury
68 " based upon such *assumptions*. *Gladmon vs. Railroad Com-*
" *pany*, 15 wall. 401. Nor will it do for counsel, upon argu-
" ment before this court, to insist that, because the counsel
" below made such assumption we are to consider the fact as
" existing. An examination of the record before us shows that
" the statements upon which the above request was made are
" without foundation. There is no evidence that the applica-
" tion, which was upon the trial, assumed to have been made,
" and which contained the questions and answers referred to
" *was ever presented to the Insurance Company*; there is no
69 " evidence that the policy of Mr. and Mrs. Baker was based
" upon such application; there is no evidence that the policy
" issued referred in any manner to *this* application, or that
" *this* application *referred in any manner to the policy*. On all
" these points we have no information. The record is abso-
" lutely silent as to each of them." * * * *

"The facts upon which the request to charge not appearing
" by the record, cannot be assumed to exist; and without ex-
" amining whether they were properly refused, if the facts
" had been shown, we can give them no consideration."

70. New Jersey Mutual Life Insurance Company, *vs.* Baker. IV Otto, 611, 613.

Under this decision, therefore, it is submitted that this Court has not in the record the facts in this case to examine the correctness of the request to charge; and the judgment of Circuit Court must stand.

SUPREME

OCTOBER TERM, 1880.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR.

vs.

BARTHOLOMEW FOLEY, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

SUBMITTED BY

BRYAN & BRYAN, ATTORNEYS.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL, PRINTERS,
Nos. 3 Broad and 109 East Bay Streets.
1882.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1880.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR.

vs.

BARTHOLOMEW FOLEY, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Upon inspection of brief filed for plaintiff in error, it has become necessary under 21 rule, Section 7, to submit a statement of the case, that made by plaintiff in error, being controverted; and also to object to the "ASSIGNMENT OF ERRORS," as made by the plaintiff in error.

STATEMENT OF CASE FOR DEFENDANT IN ERROR.

B. Foley, the defendant in error, brought this action against the Knickerbocker Life Insurance Company, plaintiff in error, to recover the amount due on a contract of life insurance upon the life of one H. H. Badenhop, the debtor of said Foley to the amount of $5,000.

The defendant in error, in his complaint, alleged the *making and delivery* on the 6th January, 1872, of the policy of insurance by defendant company, the consideration therefor, of annual premiums and the terms thereof; that he was then and is now a creditor for $5,300, etc., that H. H. Badenhop died

11th January, 1875, and his death was not caused by reason of any of the causes excepted in the said policy of insurance, etc., etc. (p. 2, folios 3, 5, record.)

The defendant company (plaintiff in error) answers the complaint and after denying certain allegations of complaint set up the *affirmative* defence as follows: "They do aver that "the said plaintiff and the said H. H. Badenhop did not make "true and correct answers and statements to certain questions
4 "contained in the application for the said policy of insurance "in that in the said application it is stated that the occupa- "tion of the said H. H. Badenhop was that of a mecrhant "when in fact it was not that of a merchant."

To the questions "Is the party of temperate habits?" "Has he always been so?" the answer given is "yes," "when "in fact the said H. H. Badenhop was a man of very intem- "perate habits, by the said answer concealing the true habits "of the said H. H. Badenhop and making a false statement of "the same," etc., (p. 13, folio 32, record.)

5

The case before this Court comes up on questions arising under this defence, and this allegation of insurance company, namely, the existence of a warranty made by "*the said plaintiff and H. H. Badenhop*," the terms of that warranty, and the breach of that warranty.

There was no evidence at the trial and none in record that "the said plaintiff and H. H. Badenhop" ever made and presented to the insurance company an *application* for insurance as the basis of the policy of insurance, in other words, there is
6 no evidence of the existence of the warranty as alleged. (See Bill of Exceptions, pp. 19, 21.)

There was no *evidence* at the trial and none in the Record, that the application *alleged* to have been made, contained any such question and answers, as alleged in the answer. (Bill of Exceptions, pp. 19–23.)

There was no *evidence* at the trial and none in the Record, that the particular application mentioned in the answer as containing the questions and answers therein set forth, referred in any manner to the policy. (See Bill of Exceptions.)

7 There was no evidence at the trial and none in the Record,

that the policy referred to *this* particular application. (See Bill of Exceptions.)

The existence, therefore, of the *alleged* warranty, the terms thereof, and the *nexus* between policy and *application*, that is, the affirmative defence as *alleged*, was not *proven* by evidence at the trial. (See Bill of Exceptions, p. 19–22.)

The testimony in support of the *alleged* breach by false answer as to "temperate habits" of the *alleged* warranty, offered by defendant Insurance Company is at pp. 19–20, folios 8
49–50, and is as follows:

"D. F. M. Robertson, who testified, that during the year "1871 and the early part of 1872, he was the family physi-"cian of H. H. Badenhop, that he attended the wife of Baden-"hop in 1871, in confinement; at that time Badenhop was "drinking hard. In the year 1871 he attended Badenhop for "'delirium tremens,' and once or twice during that year for "*indisposition*, produced, *as he thought*, from the excessive use "of intoxicating drink. *Robertson did not say the answer was* 9
"*untrue*, but that *he regarded* him as of intemperate habits." (Folio 50.)

This witness, on cross-examination, (folio 53) testified he did "*not* know Badenhop *intimately;* had no relations with "him other than professional, met him *occasionally* on the "street."

This witness' professional relation to Badenhop was limited to several months. He did not state what was the *cause* of the attack of delirium tremens for which he says he attended Badenhop. When he testifies to cause at all it is not as to 10
a fact, but to an *inference*, *i. e.*, to "*indisposition* produced, *as* "*he thought*, from the excessive use of intoxicating drink." He was most candid and careful to say when questioned, "that he did not say the answer (by Badenhop that he was of "temperate habits) was *untrue*, but that HE regarded him as "of intemperate habits," thus being emphatic to make his testimony a personal *opinion*, and *not* a positive statement of fact or a necessary conclusion of medical science. He was not examined as an expert. Did not give, either in this particular case, or in general in medical science, the possible 11

cause or causes of "delirium tremens." Yet, it is to be observed that though he testified to "*an attack of* '*delirium tremens*,' still "*he did not say the answer* (of Badenhop that he was of temperate habits) *was untrue*." (Folio 50). Finally, Dr. Robertson does not swear that he *knew* the *habits* of Badenhop, and he does not swear that at any time his *habits* were, as a matter of *fact, intemperate.*

F. W. Pieper who testified that he was intimate with Badenhop, "that he was a very intemperate man, had seen him fre-
12 "quently very much under the influence of liquor."

"John H. Ostendorff testified that he had known Badenhop "several years; that he was a very intemperate man; had "seen him frequently under the influence of liquor."

Neither of these witnesses testify as to the *time* of the acts of intemperance, and it may have been after the issuance of the policy and therefore irrelevant to the issue. They had no special relation to H. H. Badenhop. They do not testify either that they knew his *habits*, or that at *any time* his *habits*
13 were as matter of *fact intemperate.*

This is *verbatim* the whole extent and scope of the testimony of the defendant *Insurance Co.*

In rebuttal, the plaintiff introduced the testimony of the following witnesses:

Hutson Lee, agent of the Insurance Company, who testified "that at the time of the issuing the policy H. H. Badenhop "was in perfect health and was *as good a risk as he ever took.* "That he has been an insurance agent for ten years." 'That "he had known H. H. Badenhop for *several years previous*
14 "to the time of application and he regarded him a man of "temperate habits: That in 1872 Badenhop went to Europe "without a permit from the Company, whereby the policy was "forfeited, but that the Company renewed the policy in 1873 "upon an examination of H. H. Badenhop by a physician in "Germany, a certificate of which was given to the Company." (Folio 51).

B. FOLEY, who testified "he knew Badenhop for fourteen "years, saw him every day or every other day in 1871. *Knew* "*his habits* during 1871. Never saw him under the influence
15 "of liquor, *Knew his habits;* he was a man of temperate

"*habits.* He lived in his house in latter part of 1871 and a "part of 1872. He was very intimate with him." (Folio 52).

"Dr. T. Rentsjerna testified he was the *family physician* "of H. H. Badenhop for *twelve years;* never knew of any one "else being called in except in cases of his wife's confinement, "when H. H. Badenhop always got a married physician. He "knew H. H. Badenhop, intimately, for *twelve years;* knew "him in 1870, 1871, 1872. *Knew his habits.* He used alco- "holic liquors; would take a drink like any other man. He 16
"would say he was a man of *temperate habits.*" (Folio 52).

"W. GORMAN testified he knew H. H. Badenhop for *ten* years. "He was his co-partner in Columbia, in 1869 and 1870, for "fourteen months as a co-proprietor of Columbia Hotel. He "was a steady man. *Knew his habits.* He was a man of "temperate *habits.*" (Folio 53).

"WILLIAM LUDERS knew Badenhop fourteen years. Knew "his *habits;* he was a man of temperate *habits.* Knew him "in 1870, 1871 and 1872." (Folio 53).

"DR. CHARLES BROWN knew Badenhop nine years. He 17
"was a friend of mine. Saw him often; was intimate with "him; regarded him a man of temperate *habits.* Saw him "April, 1874, he was in fine health then *as always.*" (Folio 53).

It is to be observed, that this testimony, in rebuttal, comes from six witnesses of close, long-continued personal, and professional relation to H. H. Badenhop; and it is direct that they knew his *habits;* and direct that his *habits* were as *matter of fact* temperate during the very time Dr. Robertson "*regarded*" him as of intemperate habits.

With this testimony the plaintiff presented to the Court 18
"*Instructions prayed by plaintiff,*" set forth at p. 21, folios 54, 55, Record.

Thereupon "the defendant (Ins. Co.) *prayed for* the *following instructions,*" six in number, set forth at p. 22–23, folios 56–59, Record.

"And the presiding judge, being the Circuit Judge, de- "clined to give the INSTRUCTIONS AS PRAYED FOR by the "counsel for the plaintiff AND BY THE DEFENDANT; but did "charge the jury as follows:—Judge Bond charges." (Fo- 19
lio 59).

(See charge p. 23, 24, folios 60–61).

"Whereupon the counsel for the defendant, before the jury "had withdrawn from the bar, did except to the *charge so* "*given*, and especially that the presiding judge did refuse to "charge the jury as prayed for in the fifth and sixth instruc- "tions asked for by the counsel for the defendant." (p. 24, folio 61).

The Record shews there was no exception to any separate specific part of the charge by Judge Bond, but the exception
20 was a general indefinite one "to *the charge so given*."

The Record shews there was, by defendant, *no request to charge*, nor refusal by the Court to charge, singly and separately any one of the instructions as prayed by defendant Insurance Company. They were presented as a whole and rejected as a whole.

OBJECTIONS TO ASSIGNMENT OF ERRORS.

21 The plaintiff in error is required by 21 Rule of this Court to make "an assignment of errors relied upon, which in cases "brought up by writ of error, shall set out separately and "specifically each error asserted and intended to be urged." (Section 4, Rule 21).

"When the error alleged is to the *charge of the Court*, the "specification shall set out the part referred to *totidem verbis* "whether *it be instructions given or instructions refused*." (Sec., 5, Rule 21).

The three assignments of error, made by the plaintiff in
22 error, in his Brief at page 3, are not in accordance with the rule and cannot be urged here. We will consider them in order.

The first assignment of error is:

1. *In this, that his Honor the Presiding Judge should have charged the Jury that in an issue as to the habits of the assured, raised upon his answer to the question, "Is the party of temperate habits, has he always been so?" To which the answer was "yes," witnesses who spoke positively of their own knowledge of the habits of the assured and regarded him as a man of in-*
23 *temperate habits, having seen him frequently under the influence*

of liquor, and lheir positive statemeut of facts known to them and because of which they testified that his habits were intemperate, confirmed by the testimony of his family physician that in 1871 the assured was drinking hard, that he attended him that year for delirium tremens, and also at other times for indisposition from the excessive use of intoxicating drink, should receive from the jury greater consideratiou and in forming a conclusion have more weight than the opinion of other witnesses, who do not contradict those who have testified to the intemperate habits of the assured, but when they say that he was of temperate habits, can only be understood as so saying because they were not informed of the facts to which the witnesses have testified who say that his habits were intemperate.

The objection to this assignment of error is that no such request to charge in *totidem verbis* was made to the Circuit Judge at the trial. There is no such instruction prayed in the Record. (See prayer for instructions by Defendant Insurance Company, p. 22, 23 Record). No error can be assigned that the Circuit Court did not charge this proposition in the *shape* in which it is assigned as error, because in that shape it was not asked and denied.

We are here to argue one question and are met with another. It is changing the issue to change here and add to the words of instruction refused below. It was to prevent this shifting the issue that this Court by 21 Rule guarded the rights of parties and protects itself and the Court below, by requiring the error alleged in the charge of the Court to be assigned *totidem verbis*, and in default thereof determined, that counsel will not be heard.

The *second assignment* of error by the plaintiff in error, p. 3 Brief, is:

2. Because there was no evidence produced of any exceptional indulgence as the cause of delirium tremens, which in medical science is the consequence of the continued and excessive use of alcoholic liquor. That exceptional indulgence was a term of the most vague and indefinite import; if limited to a single occasion there was no evidence of any such exceptional departure from the habit of intemperance; if embracing more than a single

occasion would affirm, that exceptional indulgence ending in delirium tremens were consistent with temperate habits, while the evidence so far from supporting the attack of delirium tremens as the consequence of an exceptional indulgence proved the fact of that delirium, and connected it by the family physician, not with any exceptional, but with the excessive use of liquor.

28 The objection to this assignment of error is again, that it does not set out *totidem verbis* the part of the charge referred to, whether it be instructions given or refused. It does not state, moreover, that the Court erred in *charging* any distinct proposition, or that the Court erred in *not giving* any distinct instruction that was asked. By reference to the record, there is in the charge of the Court or in the requests to charge, no such proposition or propositions, as are contained in this assignment of error.

29 The third assignment of error by the plaintiff in error, is:

3. *Because his Honor the Presiding Judge should have instructed the jury, that the fact of the assured having had an attack of delirium tremens in 1871, would of itself raise the presumption, that it was the result of intemperate habits, unless in the evidence there was to be found the explanation which would repel that presumption. That the only evidence explanatory of the attack was, that of the family physician, who referred it to the intemperate habits of the assured, that in absence of any testi-*
30 *mony on behalf of the assured, disputing the fact of the attack of delirium tremens or the cause of it, as other than the continued and excessive use of intoxicating drink, the fact of the attack and the cause of it being testified to by an expert, unless the character and credit of the family physician was impeached, would be conclusive of the question of the habits of the accused* (*sic.*)

This is, again, we submit, in clear disregard of the 21st Rule. It does not set out *totidem verbis*, the instruction given
31 or refused, wherein error must be assigned in the charge of the Court.

It does not state that any such instruction was asked and denied by the Court.

As matter of fact, it will be seen by reference to the record, and instructions prayed by Insurance Company, that no such instruction by defendant or its equivalent, was asked by defendant Company or denied by the Court.

These three assignments, as made by plaintiff in error here, did not arise out of the trial; they could not be anticipated by us here; do not conform to the Rule of this Court, and 32
are, therefore, such as the plaintiff in error is not allowed to be heard upon, and which we cannot argue. We can only argue the law of the instructions *totidem verbis*, actually given and refused, as we have argued them in our main Brief.

At page 4, note of our argument in chief, we referred to 33
several authorities sustaining the position of Judge Bond, that it was for the jury to say whether a particular case of delirium tremens was the result of exceptional excessive indulgence in drink, and that it did not necessarily involve intemperate habits. We quote these authorities at length here:

"Although the chief cause of delirium tremens is the abuse
"of intoxicating, especially, spirituous liquors, yet this is *not*
"the only cause. * * * * *
"Practitioners have too generally concluded that the delirium 34
"of drunkards is always of the same kind, and have over-
"looked differences very generally subsisting between that
"*immediately produced* by intoxication, the first species of this
"affection; and that *indirectly occasioned* by it, the second
"species. *An occasional or even a single indulgence in intoxi-*
"*cating liquors to excess*, will sometimes give rise to the for-
"mer: a repeated, habitual or protracted indulgence, is requi-
"site to the appearance of the latter."

Dictionary of Practical Medicine, by James Copland M. D., F. R. S.

Title, "*Delirium Tremens*," p. 573, Vol. I.

"Delirium tremens can come on "as the *result of a single* "*debauch* in a person unaccustomed to the abuse of stimu- "lants." * * "It is equally to be borne in mind "that many *habitual* drunkards never suffer from delirium "tremens."

Encyclopædia Brittanica, (1880,) Vol. VII., p. 45.

Delirium Tremens. "Though this disorder is commonly
36 "connected with intemperate habits, that is *not* always the "case."

Principles and Practice of Physic: by Sir Thomas Watson, Kings College, London, F. R. S., p. 254, 2d Amer. Edition.

"*Delirium tremens* sometimes makes it appearance in con- "sequence of a single debauch."

The American Cyclopædia, (1874,) Appleton's, Vol. V., p. 783.

37 "*Delirium tremens* may be the immediate effect," says Dr. Ray, "of *an excess* or series of excesses in those *who are not* "*habitually intemperate*, as well as in those who are."

Wharton's Crim. Law., Vol. I., Sec. 33.
Ray's Medical Jurisprudence, p. 438.

It is clear, therefore, that neither in medical jurisprudence, or in medical science, is there an invariable relation of cause and effect between intemperate habits and *delirium tremens*.

38 It is also clear that delirium tremens being proved, it was a question for the jury, what was the cause.

And it is also clear that the charge of the Judge, stating that delirium tremens could result from *exceptional indulgence* in drink, was sound in law.

Bryan & Bryan
Attys for Defft in Error
J. P. K. Bryan
of Counsel

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1187.

AMELIA BENNECKE, PLAINTIFF IN ERROR,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED JANUARY 7, 1882.

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INDEX.

	Original.	Print.
Statement of case and certificate of division	1	1
Judgment	13	4
Clerk's certificate	14	5
Writ of error	15	5

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the honorable John M. Harlan, one of the associate justices of the Supreme Court of the United States, presiding judge, and the honorable Thomas Drummond, judge of the seventh judicial circuit, on Wednesday the twenty-eighth day of December, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and sixth year.

J. A. JONES,
Clerk.

Certificate of division.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for the southern district of Illinois, of the June term, A. D. 1881.

AMELIA BENNECKE
v.
THE CONNECTICUT MUTUAL LIFE INSURANCE Company.

2 This was an action in assumpsit brought by the said plaintiff to recover of said defendant the sum of two thousand dollars, claimed to be due upon the policy of insurance more particularly described in the following statement of facts, and by agreement was submitted to the circuit justice and the circuit judge, a jury having been waived by stipulation in writing.

Statement of facts found by the said judges.

On the twenty-ninth day of January, A. D. 1878, Adolphe Bennecke procured from The Connecticut Mutual Life Insurance Company, through its agent at Bloomington, Ill., a policy of insurance on his life, for two thousand dollars, for the use of Amelia Bennecke, his wife. It was a common life policy, and contained, among other conditions, the following: "3rd. That the said insured is under this policy freely permitted to reside in any civilized abode in the western hemisphere, lying north of the thirty-second parallel of north latitude in the United States, and lying south of said thirty-second parallel, excepting from the first day of July to the first day of November, and in the
3 Eastern Hemisphere lying north of the forty-second parallel of north latitude and west of the fortieth meridian of longitude east from Greenwich, and he may also pass as a passenger by usual routes and means of public conveyance to and from any port or place within the foregoing limits, but if he shall, at any time during the continuance of this policy, pass beyond or be without the foregoing limits without the consent of this company previously given in writing in each or either of the foregoing cases, then this policy shall become and be null and void."

"4th. That in every case in which this policy shall cease and determine, or shall be or become null and void, all premiums paid in respect to the same shall be forfeited to the company."

After the signatures of the secretary and vice-president of the company and on the margin at the bottom of the policy appears the following:

☞ "Agents of the company have no authority to make, alter, or change any condition of the policy, nor to waive forfeiture thereof."

4 The annual premium of forty-six dollars and twenty-four cents required by the terms of the policy was duly and fully paid.

Bennecke left his home at Bloomington, Illinois, on the twenty-sixth day of September, A. D. 1878, and went to New Orleans, Louisiana, without the consent of the insurance company first obtained, which is south of the 32nd parallel of latitude. On the seventh day of October he applied to one Philip Mohr, for employment, telling him that he had come to New Orleans to find a home for his wife and children. Mohr promised to assist him in finding employment, and did so, so that Bennecke should have gone to work in a wholesale grocery house in New Orleans on the fifteenth day of October, 1878. Bennecke died at the hospital Hotel Dieu, in New Orleans, on October fifteenth, 1878, of yellow fever.

John Ansley was agent of the Connecticut Mutual Life Insurance Company, at Bloomington, Illinois, since 1863, up to and including October, 1878. On the sixteenth day of October, 1878.

5 Ansley heard that Bennecke had gone to New Orleans, on that day he mentioned the fact of Bennecke's going south to Breckbeller; asked him if Bennecke had any friends in Bloomington, and told him that if he had, they had better pay that extra premium because Bennecke was in New Orleans, and a permit would cost ten dollars on a thousand dollars for Bennecke to go south. Breckbeller told him to go to Bennecke's brother-in-law, Christian Haker, and see about it. Breckbeller, at that time, did not know that Bennecke was sick or dead. Early on the morning of October seventeenth, 1878, Ansley called on Haker, the assured's brother-in-law, and told him to pay the extra premium on Bennecke's policy for a permit to go south, telling Haker, also, that the extra rate on this policy was twenty dollars. He told him——Bennecke would have to do that if he went south, and he had heard that he was in New Orleans. Haker replied that he knew nothing about it, but would look the matter up. The same day,

6 after a consultation with Mrs. Bennecke, Haker went to Ansley's office, and paid him twenty dollars, and took from him a receipt, as follows:

"AGENCY AT BLOOMINGTON, ILL.,

"$20. *Oct.* 17, 1878.

"Received from Christ Haker, twenty dollars, being the amount required for a southern permit on policy of Adolph Bennecke in the Connecticut Mutual Life Insurance Company of Hartford, Conn., No. 52242.

"Amount of policy $2,000.

"JOHN ANSLEY, *Agent.*"

At the time of taking this receipt, neither Haker nor Ansley knew that Bennecke was sick or dead; nor did Bennecke's wife or friends.

On receiving the twenty dollars from Haker, Ansley forwarded the money to the State agents of the insurance company, at Chicago, Illinois, and they acknowledged the receipt of the money by letter.

Ansley had other parties insured with him in the company who had formerly gone south, and ten dollars per thousand was the customary

priced fixed by the company as the extra premium on such risks.
7 He recollected of having received money for three or four such permits, possibly more, at same rate. In such cases Ansley simply received the money for the permits, forwarded it to State agents at Chicago, and requested them to get permits from the insurance company at Hartford, Connecticut, and sent them to him for delivery. The letter in which he enclosed the twenty dollars received from Haker to the agency at Chicago, is as follows:

"AGENCY AT BLOOMINGTON,
"*Oct.* 17, 1878.

"Messrs. STEARNS, DICKINSON & Co.:

"GENTS: Herein please find draft for $20, less ex., for which please get and send me a southern permit for A. Bennecke, insured by policy 52242; amount, $2,000. He went to New Orleans about ten days ago, and will probably remain there during the balance of the month. [Please give this immediate attention, and get permit here as soon as possible. This twenty dollars paid this day.]

"Yours, truly,

"JOHN ANSLEY."

8 That part of the foregoing letter enclosed in brackets was, in the original letter, written in red ink. At the time of writing this receipt Ansley had no knowledge of Bennecke's sickness or death. Ansley never received a permit from the insurance company for Bennecke. In his conversation with Haker that morning, on the seventeenth, he told him that he understood that Bennecke was then in New Orleans, and that his insurance was dead, or words to that effect, as soon as he crossed a certain line, named in the policy, going south at that time of the year, and that the southern permit must be paid for, costing twenty dollars. At first Haker refused to pay the twenty dollars, but afterwards came around and paid it the same day. On the sixth of November, 1878, Ansley having become satisfied that Bennecke was dead at the time the twenty dollars was paid him for the permit, took twenty dollars of other money belonging to the company and tendered it to Haker, stating that Bennecke was dead at the
9 time the money was paid as a reason for tendering the money to him. Haker refused to receive the money. Ansley had no authority to issue policies of insurance on the company, but after the policies were issued he turned them over to the parties on payment of the premium. Ansley received no word from the company or State agents about Bennecke's death up to the time he tendered the money back to Haker. On the twenty-sixth of October he addressed a letter to the State agency at Chicago, which was as follows:

BLOOMINGTON, *Oct.* 26, 1878.

Messrs. STEARNS, DICKINSON & Co.:

GENTS: I am sorry to say that it is now reported and believed here, that A. Bennecke 52242, died in New Orleans of yellow fever, on the 17th of this mo., the very day on which the twenty dollars was paid me by his wife's bro., in this city, and sent to you to pay for his permit. Mr. Bennecke leaves a widow with three or four children. He has been in financial distress for some time, having gone into bankruptcy
10 here over or about one year ago. He left here about one month ago, saying that he was going to Chicago. But he finally turned up at New Orleans without money, and being a Mason applied to a Ma-

sonic lodge there for help, and that lodge telegraphed to his lodge here to learn whether he was in good standing. At the time he left here he was clerking in a retail shoe store, at $40 per mo. He was also our city treasurer, at $40 per month. The city is minus a litle over $100. After I became satisfied that he was in New Orleans, I thought it was my duty to inform his wife or one of her brothers that a permit should be paid for, and obtained at once. I mentioned the matter to your spl. agt., Mr. Moore, who was of the same opinion. I therefore called at the dwelling house of her brother, and on the second call found him and informed him. At first he was unwilling to do anything, and I left him; this was early in the morning. About nine or ten a. m. of the same day, he came to me and paid me the twenty dollars, for
11 which I gave him a receipt, stating that I would send the money forward at once and get a permit, which I have done. But the permit has not yet been received. I have done what I believe to be my duty in the case. If I had not done this everybody would say, why did not the agent inform the wife, now widow, that a permit must be obtained? I trust the matter will come out all right.

Yours, truly,

JOHN ANSLEY.

P. S.—I am also notified that Mr. C. A. McClure, insured by 43648 for $2,000, is dead. Please send me blank proof and oblige.

J. A.

Ansley knew this was the price paid for a permit, and had never applied for one without getting it. But he never applied for one when yellow fever was there. He made the tender of November 6th of his own accord, and had heard nothing from the company or the State agents up to that time, except a receipt from the State agents for the money. Proofs of loss, dated the sixth of December, 1878, were
12 furnished the insurance company. The defendant company on the trial offered to return the money received by Mr. Ansley for the permit. Suit on the policy was begun in the circuit court of McLean County on the eighteenth day of April, 1878, by a declaration on the policy of the insurance. Defendants filed a plea of the general issue only. On the petition of the defendant the case was transferred to the circuit court of the United States for the southern district of Illinois. It was admitted by the insurance company that there was no other defense in the case than what arose from the forfeiture of the policy by the assured going south of the thirty-second parallel of latitude without the consent of the company being previously given in writing; and on the foregoing facts it occurred as a question whether the forfeiture had been waived by the company, on which question the judges were opposed.

Whereupon, and on motion of the defendant, by its counsel, that the point on which the disagreement had been made during the term
13 be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court to be finally decided, it is ordered that the foregoing state of the pleadings, and the foregoing statement of facts found, and of the question on which the judges differed, all of which are made under the direction of the judges, be

certified according to the request of the said defendant by its counsel and the law in that case made and provided.

JOHN M. HARLAN,
Associate Justice, S. C. U. S.
THOMAS DRUMMOND,
Cir't Judge.

This cause having been heretofore submitted to the circuit justice and the circuit judge, and having been considered upon the law and facts by stipulation in writing of the parties, it is found as a conclusion of law, upon the facts set forth in the foregoing certificate of division, in conformity with the opinion of the circuit justice, that the
14 plaintiff is not entitled to recover against the defendant; and it is considered and adjudged, in conformity with the opinion of the circuit justice, that this action be, and is hereby, dismissed, and that the defendant recover of the plaintiff its costs in this behalf expended.

JOHN M. HARLAN,
Circuit Justice.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify the foregoing is a true and correct copy of the certificate of division filed and entered of record in a certain cause wherein Amelia Bennecke is plaintiff and the Connecticut Mutual Life Insurance Company is defendant, as truly and correctly as the same appears of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this second day of January, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 106th year.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsed:) U. S. Supreme Court. Oct. term, A. D. 1881. Amelia Bennecke vs. The Connecticut Mutual Life Ins. Co. Cert'f. of division.

15 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Amelia Bennecke, plaintiff, and the Connecticut Mutual Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by her complaint appears: we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of January, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice Sup. Ct. U. S.

(Indorsement on cover:) No. 1187. Amelia Bennecke, plaintiff in error, vs. The Connecticut Mutual Life Insurance Company. S. Illinois C. C. U. S. Filed 7th January, 1882.

IN THE

Supreme Court of the United States,

JANUARY, A. D. 1882.

AMELIA BENECKE

VS.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

ARGUMENT FOR PLAINTIFF.

"Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties."—*May on Insurance.*

ROWELL & HAMILTON,

Attorneys for Plaintiff.

AMELIA BENECKE

—vs.—

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

May it Please The Court:

In this case the only question is, whether the defendant will be allowed to escape the payment of a policy of insurance on the life of Adolph Benecke, when at the time of his death every cent of the premium demanded by the Company had been duly and fully paid, as well as the sum of $20, expressly demanded for *extra risk* by the Company, through both a local and a special agent, and received by the state agents of the Company, and presumably (in due course of mail) by the Company itself at Hartford, and by it retained without objection.

Benecke's life was insured for $2,000, in favor of the plaintiff, his widow. The premium on this policy had all been paid in full. He owed the Company nothing for insurance; and therefore there is no question of the insurance or re-insurance of a life not in existence, as insisted upon by the defendant's counsel, in their argument. But there was a condition of forfeiture of this insurance, already obtained and paid for, in the policy; viz., that if the insured *resided* south of the thirty-second parallel of north latitude from the first day of July until the first day of November, the policy should be null and void. The assured went south of that parallel late in September. After the Insurance Company, through both its local and special agents (see Ansley's letter to state agents), had learned of this violation of the policy, and had learned of their right to forfeit the policy for such violation, they deliberately chose not to forfeit the policy on that account, but went, by their agents, to the friends of the assured, told them of the forfeiture, and demanded

and received of them $20 for a waiver of that forfeiture. *An express waiver.* They testify by their agent, John Ansley, that it was "*the customary price fixed by the Company*" for the waiver of such forfeiture,—a price many times received by him for exactly the same thing without objection. Ansley, the agent of the Company, after consultation with Moore, the special agent of the Company, demands and receives this "*customary, fixed*" price for such waiver, sends it immediately on to the state agents of the Company at Chicago, Messrs. Stearns, Dickinson & Co., with the full explanation in the letter of remittance, that Benecke was already south of the forbidden parallel of latitude; and the state agents are supposed to have forwarded it, with the same explanation, in due course of mail, to the office of the Company at Hartford, where it would have arrived forty-eight hours thereafter. This was on the 17th day of October. This money was received and retained by the Company ever afterwards.

The Court finds that after John Ansley sent the money to the state agents, he *never* heard from them or the Company, except a receipt from the state agents for the money. This, then, is positive evidence that the Company received the money in due time, with a full explanation from the agents as to what it was for, and then deliberately chose to retain it. It is true that Mr. Ansley says that on the 6th day of November, *nineteen days* after the money was received, he, of his own motion, without authority from the Company (for he had never heard from the Company or its agents since their receipt of the money), took other money of the Company, in his hands, and went and tendered back to Mr. Haker, from whom he had received it, the $20. But he had received no authority to make such tender for the Company, and the money paid for a waiver of the forfeiture was then in the hands of the Company, with full knowledge of the forfeiture, and has been retained by the Company ever since.

Neither the Company nor its state agents ever expressly granted, or refused to grant, this waiver of the forfeiture already accrued by the terms of the policy; but we insist that accepting and retaining the money, with full explanation of its purpose as was contained in Ansley's letter to the state agents, is sufficient, by every rule of law and justice, to bind the Company to a waiver of this forfeiture. In fact, the Company do not deny that they received and retained the money, and even go so far as to claim, in the argument of counsel for defense, that they

had a right to receive and retain the $20, and yet insist upon a forfeiture of the policy. That they are bound, by accepting and retaining the money, to a waiver of the forfeiture of the policy, is too plain a principle of law to need citation of authority to support it. And we desire to suggest right here, that which to our minds fully explains the strange action of the Company in receiving the money and never saying anything at all about granting a waiver of the forfeiture or not. You will observe that the time during which Benecke was forbidden to reside in the South expired on the first day of November. The Company received the money for a permit about the first of October, and never responded, except by receipt, thereby allowing the month of October to expire without expressly saying that they would or would not grant the permit, so as to place themselves in the following condition: After the first of November, Benecke had a right, by the terms of the policy, to reside in the south; and the Company and its agents undoubtedly thought, that by holding the money and saying nothing, when the first of November came, if Benecke was still living, they could safely claim that they had granted the permit; but if he should die before that time, they could then insist upon a forfeiture of the policy by denying that they had expressly granted the permit. It was a very shrewd and sharp practice on the part of the Company, but is too apparent to be overlooked in a court of justice.

But the counsel for the defendant, in their argument, virtually admit the contract of waiver arising out of the acts of the Company and its agents in demanding, receiving, and retaining the $20, and try to avoid its effects in two ways, viz.: *first*, They say that the contract of waiver was void because Benecke was dead when it was made (although neither party knew that fact); and, *second*, It is void because $20 was not a sufficient consideration. We think each of these positions are utterly untenable. The plaintiff's counsel, as we believe, and as the circuit court held in deciding this case, have always been mistaken in their idea of the subject-matter of this contract of waiver. The subject-matter of this contract was not the *life* of Benecke. His *life* was the subject-matter of the contract made by the insurance policy, and the payment of the premium; but the subject-matter of this last contract was, that *the Company would waive its right to declare the policy forfeited for violation of one of its conditions.*

Benecke had gone south of the thirty-second parallel; the Company and its agents knew that fact; they knew that they had a right to immediately treat the policy as forfeited, null and void. But they elected to do otherwise, and chose to take their *fixed rate* of $10 per thousand for a waiver of that forfeiture, after they knew that the forfeiture was complete.

The waiver of a condition of forfeiture put in the policy for the benefit of the Company, then, was the subject-matter of this latter contract; and it was wholly immaterial whether Benecke was dead or alive. His death at New Orleans was not a forfeiture of the policy. It was only the ripening and maturity of the policy; and, but for the fact that he died there in October instead of November, nothing could be said against the policy by defendant, and by this latter contract the Company simply said, "We will waive the advantage we have got by his going south, for $20," and chose not to enforce it.

For the same reason the argument of defendant that $20 was not an adequate consideration is untenable.

With affected surprise counsel for defendant exclaim, "What! is it to be supposed that the Company agreed to immediately pay over $2,100 for $20?" Our answer is, that the $20 was not paid as a consideration for the $2,100. The $20 was not paid to purchase Benecke's insurance. *The insurance had been purchased and paid for at your own terms long before; and by a written policy you had agreed to pay this* $2,100 *on the death of Benecke; and the* $20 *was only paid, at your demand, to purchase your waiver of a little condition of forfeiture by which you might have avoided payment of the* $2,100 *of insurance which you owe us.* We have incurred no forfeiture by your own acts and admissions; and therefore, while it is true that Benecke was dead when the $20 was paid (which fact was unknown to both parties), the subject-matter of that contract was the waiver of the condition of forfeiture, after the fact of forfeiture was fully known to both parties; and it had nothing to do with the question as to whether Benecke was dead or alive.

This position taken by us, and our theory of the law, is fully sustained by numerous cases cited in our brief; and the exact question at issue in this case—to-wit, "Can an insurance company waive a forfeiture of a policy by violation of some of its conditions after the death of the assured?"—is expressly,

strongly, and conclusively decided by the Supreme Court of the State of Illinois, which the federal court will follow, in *Chicago Life Ins. Co. vs. Warner*, 80 Ill., 411, *to which we invite your*

ESPECIAL ATTENTION.

In that case the policy contained the following condition: "If the said premiums shall not be paid on or before the days above mentioned for the payment thereof, except as herein provided, then in every such case this policy shall be null and void, and said company shall not be liable for the payment of the sum assured or any part thereof." The premium fell due on the 28th of June, but was not paid then. On the 2nd day of July the Company, by its secretary, addressed a communication to the assured as follows: "The premium on your policy, No. 3,244, fell due June 28. You will please remit," &c. The assured died June 29, after which, the beneficiary in the policy, having received the letter from the Company of July 2, tendered the overdue premium to the Company. Held by the Court "*that the Company had waived the forfeiture, and was liable for the full amount of the policy;*" and in that opinion the Court say, quoting from May on insurance, "*Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties.*" And the force of this case and decision cannot be broken by the argument of counsel for defendant, that in that case there had been a custom of the Company to receive the premium after due; for while that point is mentioned in the opinion, it is expressly decided on the ground of waiver of the forfeiture by acceptance of the money after the forfeiture had accrued, and after the assured had died, although that fact was unknown to the Company there as in this case,—the only difference being, *that in that case the beneficiary knew that the assured was already dead when the money was paid, while in this case neither party knew.* But if the case in the 80th Illinois be put on the ground of *custom*, we have a still stronger case here; for we have proven by the agent of the Company, Ansley, and it is uncontradicted, that the $20, or $10 per thousand, was *customary* and *fixed* rate of the Company for such waivers of forfeiture, and therefore Ansley himself had a perfect right to receive the money and make the contract of waiver, and it bound the Company from that moment.

The case in 80th Illinois is certainly conclusive of this case. When the Company received this $20 through its agents, on the 17th of October, it was its duty, in good conscience and in law, to either issue the permit at once or refuse to issue it and return the money within a reasonable time; but so far as this evidence shows, the Company received the money, and never returned it, and the local agent only made a tender of it on his own motion, without instructions from the Company, nineteen days after it was received.

Counsel for defendant, in their argument, say that the $20 was paid on an application for a "*permit for future travel and residence*," &c. This position is also untrue. The $20 was paid to and accepted by the Company, on the statement to it that Benecke had *already gone* to New Orleans, as shown in Ansley's letter to the state agents. The Company was notified that the condition of the policy was already broken,—that the forfeiture had already accrued; and it was clearly to mend that technical breach and to save the policy, that the $20 was paid and accepted.

In support of the foregoing argument of our case, we cite the following authorities:

A party cannot retain the consideration of a contract and still insist on its recission.

—Graham vs. Halloway, 44 Ill., 385.

—Staley vs. Murphy, 47 Ill., 241.

A contract must be rescinded within a reasonable time.

—Pennell vs. McAfferty, 84 Ill., 364.

If an agent of an insurance company knows of the existence of a forfeiture, and makes no objection, or accepts money after such knowledge, the forfeiture is waived.

—Bliss on Life Insurance, 2d ed., pp. 344, 310–11.

—May on Insurance, p. 435, § 362.

—Phillips on Insurance, vol. i. p. 501.

—Bevin vs. Conn. Mut. Life Ins. Co., 23 Conn., 244.

—Lycoming Ins. Co. vs. Barringer, 73 Ill., 230.

—Mut. Benefit Life Ins. Co. vs. Robertson, 59 Ill., 123.

Knowledge of the agent is sufficient.

—Beebe vs. Hartford Mut. Fire Ins. Co., 25 Conn., 52.

The Company is estopped from insisting upon a forfeiture by reason of any restriction made for its benefit, when by its acts it has waived it.

—Williamsburgh City Fire Ins. Co. vs. Cary, 83 Ill., 453.

Waiver of forfeiture by agent is good.

—Lycoming County Mut. Ins. Co. vs. Shallenberger, 44 Penn. Stat., 259.

—Woodbury Savings Bank vs. The Charter Oak Ins. Co., 31 Conn., 526.

In the present case defendant's counsel insist that the policy prevented the agent from waiving forfeiture. This we deny. There was nothing of that kind in the policy. After the signatures, and in the bottom margin, was simply a memorandum saying that the agent had no such right; but this was no part of the policy, and there is no proof that the assured ever agreed to it. But the Company itself approved the waiver by receiving and retaining the money.

—Union Ins. Co. vs. Chipp, 93 Ill., 96.

Waiver by agent good after forfeiture.

—Buckbee vs. The United States Ins. Co., 18 Barbour, 541.

—Keenan vs. The Mo. State Mut. Life Ins. Co., 12 Ia.,127.

—Rathbone vs. City Fire Ins. Co., 31 Conn., 194.

—St. Paul F: and M. Ins. Co. vs. Wells, 89 Ill., 84.

In the latter case the Court say, "This Court has in many cases held that notice to the agent of an insurance company is notice to the company." Also,—

—Atlantic Ins. Co. vs. Wright, 22 Ill.

In such case as this the company is estopped by circumstances which constitute a waiver of forfeiture, from denying the validity of the policy.

—Teutonia Life Ins. Co. vs. Anderson, 77 Ill., 384.

See, especially,—

—Chicago Life Ins. Co. vs. Warner, 80 Ill., 411.

No limitation on agents by foreign companies binding.

—Ins. Co. vs. Wilkinson, 13 Wallace, 222.

Payment of premium to agent binds the company.

—90 Ill., 545.

In conclusion, we most respectfully ask a careful investigation of the facts and law in this case by this supreme tribunal; for, while the amount involved is not large, it is the entire hope of salvation from poverty, of a widow and children, of one who evidently supposed he had, at least partially, provided for their comfort after his death, in the security of life insurance. In full confidence that justice will be done, we respectfully submit their case.

JONATHAN H. ROWELL,
JOHN M. HAMILTON,
Attorneys for Plaintiff.

Wm. A. McKinney
of Counsel.

Pantagraph Press, Bloomington, Ill.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1881.

AMELIA BENECKE

v.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

Certificate of Division from the United States Circuit Court, Northern District of Illinois.

ARGUMENT FOR DEFENDANT.

EDWARD S. ISHAM,
For Defendant.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 47 AND 49 DEARBORN STREET.
1881.

SUPREME COURT OF THE UNITED STATES,

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CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 47 AND 49 DEARBORN STREET.
1881.

May it Please the Court:

The question presented by this case comes before this court upon a certificate of division from the Circuit Court, made by the Circuit Justice and the Circuit Judge.

In perhaps its shortest form of statement, the case is this:

In September, 1878, Adolphe Benecke, of Bloomington, held a policy of life insurance, which contained the usual provisions limiting the risk to residence in certain latitudes, and an agreement that the policy should be void if, without license from the insurer and payment for the extra risk, the insured should go beyond those limits. These are not among the provisions that have sometimes been criticised as overstringent. They have uniformly been recognized as reasonable and essential to the security of the insurer, and the matter of conformity to them is of course wholly within the control of the insured. In the summer and autumn of 1878 the yellow fever prevailed with unprecedented activity and malignity in New Orleans—which was far within the excluded territory—and throughout the region of the lower Mississippi. While this was so, Beneke absconded and disappeared from his home. It is one of the perils of an insurance company, and of its policy-holders, that its so-called agents are more interested in the general business of their local agencies than in the protection of the company in individual cases. On the 17th of October the local

agent at Bloomington learned from a newspaper item that Benecke had been seen in New Orleans. If that was true, the policy had already ceased to be in force. The insured had voluntarily and recklessly subjected himself to a risk which the company never agreed to assume, but which it was expressly agreed it should not assume. But the local agent immediately called upon one Haker, a brother of Mrs. Benecke; told him he had heard that Benecke was in New Orleans; that a permit should be got, and that the policy would be avoided unless a permit was procured, and that it would cost $20.00. The brother, who it appears had already known for ten days that Benecke was in New Orleans, refused to have anything to do with the matter; but he says he told the agent he would "*look over the policy.*" Later in the day, having discussed the matter with Mrs. Benecke, and having "*looked the policy over,*" he came to Ansley, the agent, with the $20.00. Ansley told him he could not issue the permit, but must send the money to the company with an application for the permit. The policy which he had just examined told him that the agent had no authority to waive a condition or a forfeiture. He sent it in his course of business to the general agents at Chicago, who in their turn wrote the company applying for a permit. The permit in question was one *to travel and reside* within the excluded territory. An application for a permit to travel and reside certainly *implies that the insured is still alive.* Some time afterwards intelligence came that Benecke had died Oct. 15th, at New Orleans, of yellow fever, so that he *had been dead two days* when the application for permit for *future travel and residence* was made. Ansley immediately found the

brother, and on the 6th of November tendered him the $20, but he refused to receive it. Thereupon, on October 26, Ansley wrote the fact of the death, but mis-stating *the date* of it,—for he said it occurred on the 17th, the same day with the application,—to the agents at Chicago, and the information possibly reached the company about the first of November. Even at that date, therefore, the company was still ignorant that the insurer had been dead two days already, when information first reached even Ansley that he had crossed the agreed boundary.

It is claimed by the plaintiff that by the matter above stated, the insurance company consented to a waiver of its defense—to a waiver of the unknown fact that the insured had died in a wanton and reckless exposure of his life, and in a flagrant violation of the conditions of the policy; and also of the fact that he had been *already two days dead* when the application was made by third persons for a permit for future travel and residence. The question is now submitted, whether, upon the facts found, the insurance company is liable on the policy.

We think there can be no dispute of the wholly unprecedented character of such a claim as is advanced here. It is to be borne in mind that there was *never any permit granted* in this case. The agent had no power to make any *contract* whatever. He never issues a policy. When policies issued by the company are sent to him, he delivers them, and collects the premium. He issues no permits. The policy itself, that morning inspected by Haker and Mrs. Beneke, declared to them that he had no authority to do so. He could simply forward the money and the application to

the State agents at Chicago, and ask them to apply in their turn to the company. He had known permits to be granted in ordinary seasons, but had never known one granted for New Orleans when yellow fever was there. And right upon the heels of this application, and *before any action of the company could possibly be had upon it*, came the notice that the man for whom the permit was asked was dead. No waiver of the condition of the policy was made by any permit actually issued by the company. There is nothing in the case but the application forwarded, the receipt of Ansley, and his tender back of the money when he heard of the death There is *no action of the company in the case at all*, for the news of the death followed too close upon the application for permit to allow of any; *and even the first act that did transpire between Ansley and the brother-in-law, Haker, occurred when the insured had been dead two days.* It is out of these acts that transpired between these parties after these two days, that the waiver must be made out by implication, if at all. And it looks to us like a very sterile soil for such a fruit.

We are at a loss to comprehend that a waiver of all the rights of the company, and of the other policy holders—for it is a mutual company—can be *thought to have been intended* by the company, and so raised by implication, in such an extraordinary state of affairs. To hold such an intent to be implied, appears to violate all the settled rules that have customarily governed such a relation of parties.

Putting apart from further discussion the consideration that the so-called local agent (the agent of the agents at Chicago, who had himself no relation to or communication with the company itself), had

no power to make any contract for the company, whether of waiver or of any other sort, we meet the salient and crucial fact that in these dealings, which are supposed to operate a waiver by the company, *neither party knew* that the *insured was already dead.* If it might be said that the company consented to waive Benecke's breach, by going south, of the conditions of *a subsisting contract*, nevertheless the fact remains that it was ignorant that the contract, supposed to be subsisting, no longer existed; that there were at the time no conditions to be waived; that the contract with its incidents and conditions was at an end; and that the subject-matter of the contract had ceased to exist. The idea of waiver in ignorance of such material facts is impossible. "A waiver of a stipulation in an agreement must, to be effectual, be made *intentionally* and with *knowledge of the circumstances.*" Addison on Cont. § 359. In *Combs* v. *Scott et al.*, 12 Allen, 496, the supreme court of Mass. said:

"The general rule is perfectly well settled that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified, will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. . . . Whoever, therefore, seeks to procure and rely on a ratification, is bound to show that it was made under such circumstances as in law to be binding on the principal; especially to see to it that all material facts were made known to him. The burden of making inquiries and of ascertaining the truth, is not cast on him who is under no legal obligation to assume a responsibility, but rests on the

party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable."

In *Diehl* v. *Ins. Co.*, 58 Pa. St. R. 452, the court said:

"The object was to establish a waiver of a breach of conditions. But this *never occurs unless intended;* or where the act relied on ought in equity to estop the party from denying it. The doctrine of waiver seems applicable, properly speaking, *only during the currency* of the contract. No doubt if the company had called for an assessment on the plaintiff's note while the property was being used, after the application of steam, and *with a knowledge* of such alteration and use, it would have been estopped from setting that up. But that was not the case, as already shown. *There must be knowledge to establish a waiver.* 5 Denio, 154; 23 Conn. Rep. 244; 19 Barb. 440; 38 Id. 402. After a policy is forfeited, I see not how it could be renewed or revived, except by an express agreement of the insurers. That it can only be done in this mode, seems to be the doctrine of the case of *Carroll* v. *The Charter Oak Insurance Company*, 38 Barb. 402.

At the time the company is claimed to have waived a *condition* of a contract, all of the parties were *ignorant* that the *supposed contract itself had ceased to exist.* The rule is too elementary to be argued, that waiver, in ignorance of material facts, is impossible in law.

Other considerations preclude a waiver. Every implied waiver must be founded either upon *consideration* or upon *estoppel.* *Underwood* v. *Ins. Co.* 57 N. Y. 506. In that case the Court say:

"Unless there is some consideration for a waiver, or some valid modification of the agreement between the parties which contains the condition, I think there can be no waiver of a condition precedent, except there be in the case an element of estoppel. The true rule, I think, is laid down by

Mullin, J., in *Ripley* v. *The Ætna Ins. Co.* (30 N. Y. 136), as follows: 'It seems to me that a waiver, to be operative, must be supported by an agreement founded on a valuable consideration; or the act relied on as a waiver must be such as to estop a party from instsing on performance of the contract or forfeiture of the condition.'"

Because it is neither consistent with common sense and ordinary discretion, nor found to occur in experience among sensible people of ordinary business conduct, the law makes no *presumption* that business men, in the conduct of their business, recklessly but intentionally abandon their important and just legal rights of contract *without any consideration* whatever. The law bases its implications of the intent of parties upon what might be the reasonable conduct of prudent men, and assumes that courts, in their administration of the law, will proceed upon this reasonable foundation. The rule of *estoppel* rests upon the same basis. As a benefit received by one party or an injury assumed and borne by the other, equally constitute an adequate consideration in law, so where one of the parties having a legal right has himself so proceeded with reference to it, that he has induced the other to act in good faith, upon the belief that the right would not be insisted upon, and so that he would be injured if the right were, notwithstanding asserted, the first party is *estopped* to assert the right, on account of what *he has done* and of the *consequent* injury of the other party. A perfect illustration of this is the case of *Ins. Co.* v. *Warner*, 80 Ill. 410, which was cited by the plaintiff on the hearing of this case. There the policy provided that it might be forfeited if the annual premium was not paid on the day it fell due. But in that case the company

had been in the habit of receiving the premium after the day, without reference to conditions, and by various other facts had *fairly given the insured to believe* that strictness of payment on the day *would not be insisted upon* as a ground of forfeiture. The payment fell due on one day and the insured died on the next, the payment not made. It was held, properly enough, that the *previous habit* of the company in giving time upon these payments *had led the insured to believe that time would be given upon this one*, and that he had *acted upon that belief*, so that he would be unjustly damaged if the forfeiture were asserted. Accordingly the company was held estopped to deny that it had given time upon these payments, and had waived its right of forfeiture for non-payment on the day. These principles are so elementary that we would not be justified to repeat them here had not these elements of *consideration* or *estoppel*, one or the other, or both, been essential to support the present claim, while in fact neither both nor either had a shadow of existence. We maintain that in the very nature of the case there could be no waiver here; and we insist that the company was under no legal duty to make any tender back of this $20 at all.

Take first the element of *consideration*, entirely apart from that of estoppel, as underlying a waiver. Benecke was dead. If the insurance company *did* agree by implication to waive existing rights known or *unknown*, then its agreement was to pay $2,100 and more *instanter*. What consideration was there for that? The court must find, by implication, that the company said to Mrs. Benecke: "If you will let us keep this $20 we will, in consideration of that, pay $2,100 right back!" Was $20 a con-

sideration for that—a consideration "reasonable" and "adequate," as the law implies? Is such an *actual* intention so *probable* in the light of common experience that the court is compelled to assume it? Where there is no legal or moral obligation to pay at all, is the payment of $2,100 in immediate exchange for $20 so demanded by justice that the court is *compelled to presume an actual intent* and agreement to pay it? And if there was no such actual intent,—if the pretended consideration is neither adequate nor reasonable,—if actual intent is precluded by inherent improbability,—if the pretended implication is false,—if this compulsory delivery which is claimed of $2,100 is not justice,—what is the principle which underlies this *implication* which is untrue, unreasonable, unjust?

The effect of any waiver or estoppel arising from what was done in this case would be to put the parties in the same position they would be in if the company had, on October 17, accepted the money out and out, and *had granted the permit applied for.* It would be to make the receipt given by Ansley practically a permit, without reference to his powers or the intent of the parties. More than that it surely cannot be pretended that the plaintiff is entitled to. In the present case the company would be held by such implied waiver to the equivalent of a permit given on or after the 17th of October, 1878, for the *future residence* of Benecke in New Orleans. That was what was applied for; that was the permit to be given. That was what is assumed to have been contemplated by the parties, and in the nature of the case it involved the understanding that Benecke was alive and able to avail himself of the permit.

But it must be remembered that this thing, in consideration for which the $20 was offered, a permit for a living man, *was not the thing at all* to which the court is asked to hold the company to have assented. If Mrs. Benecke had obtained a permit, she knowing, but concealing the fact that her husband was already dead, it would have been void for the fraud and deception. This shows how vital was this fact, which was unknown to all the parties, and which was *excluded by the application*. If a man insured under a fire policy pays an additional premium which is intended to cover an extra future fire risk on the premises, and it afterward turns out that some days before the payment or application the insured had recklessly burned his own building, would the insurance company be held to have waived that fact also, as well as to have assumed the future risk bargained for? It would seem as if the very statement of this question carried its absurdity on its face. In the present case the party applied for a *permit for future travel or residence* in the excluded regions. There "is an implied understanding in such cases that the insured is still alive." Bliss on Life Ins. § 195; *Pritchard* v. *Life Ins. Co.*, 3 C. B. N. S. (91 E. C. L.) 226; *Mut. Ben. Ins. Co.* v. *Ruse*, 8 Ga. 534. Assume then, for the argument, that the money was accepted and permit issued. Acquiescence and waiver could go no farther than that. It turned out afterwards that the insured was dead and buried when the application was made, and that he had died in a most flagrant and reckless violation of his contract. The man who went from Bloomington to sojourn in New Orleans when the pestilence was at its height in October, 1878, was in his relation to a life policy,

not different from a man who under a fire policy burns his own house. Was all this waived too? What was the consideration for that? The $20 was paid upon a proposition for future residence, and "upon an understanding that the insured was still alive." Bliss on Life Ins., § 195. *Lefavour* v. *Ins. Co.*, SHARSWOOD, J., 1 Phila., R. 558. What was the consideration visible to the court upon which this company ought to be held to have agreed to waive the *unknown* fact that the insured *was already dead and buried*, that the policy was *void*, and to pay $2,100, which it was under no obligation, legal or moral, to pay? Such a thing as this might be made the subject matter of a new contract; but it could not arise by waiver under a contract which had ceased to exist.—*Diehl* v. *Ins. Co.*, *supra*.

There is not a shadow of consideration in this case upon which the assumed waiver can be based; nor is there any more any element of *estoppel*. The reason is plain; Benecke was dead. No further action was possible on his part by which damage could be incurred in relation to this policy.

"If the company, by its acts or declarations, induces a person to believe that his policy is still in force, or that proofs of death are sufficient, the company may very properly be held to have waived any defense on these grounds, or rather to be estopped from setting up any such defense. They have by their act induced the assured to do or to refrain from doiug something, and he is or may be damaged thereby. So, if there is a new consideration, that alone makes the waiver binding. But where at the time the acts were done, oa the declarations made by the company, which are alleged to constitute a waiver or estoppel, the assured could not in consequence thereof, by any possibility, have been

damaged, there is in law no waiver. For instance, if *after a death has occurred*, the company, under an error of fact or law, treats the policy *as having been in force at the time of the death*, there is no reason why they should be held to have waived a defense that the policy was not in force, or be estopped from setting up such a defense, for it was not possible for the assured, at that time, by any act of his, to have given efficacy to the policy." Bliss on Life Ins. § 267.

What did Benecke do in connection with his absconding and going to the plague-infested New Orleans, or in connection with his sojourning and dying there, to which he was induced by any action of parties here, not occurring till long after he was dead ?

"The waiver that is spoken of in these cases is another term for estoppel. It can never arise by implication alone, except from some conduct which induces action in reliance upon it to an extent that renders it a fraud to recede from what the party has been induced to expect."

Security Insurance Co. v *Fay*, 22 Mich. 473.

"To constitute an estoppel there must be such conduct on the part of the insurers as would, if they were not estopped, operate as a fraud on the party who has taken or neglected to take some action to his own prejudice in reliance upon it. Where nothing has been done or neglected by their authority, and where no act has been done or left undone by the insured, in reliance upon the act or non-action of the insured [insurer], there can be no estoppel."

May on insurance, § 507.

Greenfield v. *Mass. Mut. L. Ins. Co.*, 47 N. Y. 430.

It was in the nature of the case impossible that Benecke, being dead before, ever did or ever could

act upon anything said or done in connection with the application or payment for permit for his future residence in New Orleans. There was, therefore, no waiver, either expressed or implied, upon consideration or estoppel, of the fact that Benecke died in New Orleans in violation of the policy.

We confess ourselves utterly at a loss to comprehend what principles of law, that were ever applied to any other contract, can vindicate such a claim as is made against the defendant in this case. It looks like a proposition that an insurance company must pay in any case when a man dies, right or wrong, contract or no contract. This is not a case of thoughtlessly crossing a boundary and returning unharmed, and then a rigorous forfeiture upon the letter of the contract. The insured *died* in violation of the contract, and the violation of the contract *caused* the death. *He knew* when he crossed the boundary, and *we did not*. The condition of this policy was reasonable, and is always held so. The time and circumstances chosen for its violation made it reckless and inexcusable to the last degree. The pestilence was a fury in New Orleans. The company was entitled to the continuance of Benecke's life under those sanitary conditions under which it had agreed to insure it. Ansley had *never known it to give a permit* for that region when the yellow fever was there. If the insured had the right of a fool to squander his own life, it was not so with the responsibility and suretyship of others with whom he had contracted.

Nor can we understand any better, how the case of *Chicago Ins. Co.* v. *Warner*, 80 Ill. 410, can be thought to bear any analogy to this. We have al-

ready stated the substance of that case on page 8. That case was put upon the ground that the "*practice* of the company and its *course of dealings with the* "*insured*, and others known to the insured, *had been* "such as to *induce a belief* that so much of the contract as provided for a forfeiture in a certain event "would not be insisted on." And a letter written by the company a day or two after the insured was dead, was relied upon by the Court, *not as a waiver in itself after the death*, but as *confirmatory evidence* that the company had *already* waived the forfeiture, and that when the payment came due, and the company knew it was not paid, and *when the insured was alive*, it *had not* elected to forfeit the policy, but the right of forfeiture "*had been*" waived. The letter was regarded as evidence that the view of the Court was right, that the course of dealing of the company, *before* the insured died, *had* waived the condition of strict payment, and had induced him to believe it would not be insisted on. Accordingly the Court said:

"*This view of the matter seems more reasonable* from the *subsequent conduct* of the company. After the premium was *past due*, and on July 2d, they wrote to the insured, if he desired to continue the policy in force, to remit the amount of the premium.

"This letter *clearly shows* that the company *had not* elected to forfeit the policy for the failure to pay the premium when due, but that the *right* of forfeiture reserved in the policy *had been* waived."

Other elements of evidence tending to the same result are dwelt upon in that case by the court. The ruling of the case is that *before the death a course of dealing*, relied upon by the insured, had practically changed the contract so that it was *no longer a contract that became void* if payment

was not made on the day. That element had been eliminated by the parties. There was no question in that case, in the mind of the court, about *waiver after the man was dead.* The waiver occurred before he died; the letter of July 2d was *evidence* of that previous waiver; and the insured was held to have been induced by the action of the company to rely on that waiver. We are utterly unable to comprehend how upon any recognized principle of law or justice the defendant can be liable here. Benecke knew when he crossed that line, which at that time was almost a "death line"; but *his insurers did not.* And there can be no extravagance in the statement that a judgment against the insurers in this case will be without a parallel on the face of the earth.

The case of *Diehl* v. *Adams Co. Ins. Co.*, 58 Pa. St., *supra*, is in principle like the one at bar. The company had insured a tannery "without steam," and steam was afterwards put in without knowledge of the insurers. Afterwards they collected an assessment on the policy. It was *held* that there could be no waiver *because the contract had ceased to exist*, and the insurers were ignorant of it when the act relied on as waiver occurred. The court said:

"Some days prior to the direction to assess, the note had *ceased to be obligatory or liable* to any future assessments. The object was to establish a waiver of a breach of conditions. But this *never occurs unless intended;* or where the act relied on ought in equity to estop the party from denying it. *The doctrine of waiver seems applicable*, properly speaking, *only during the currency* of the contract. . . . After a policy is forfeited, I see not how it could be renewed or revived, *except by an express agreement* of the insurers. That it can only be done in this mode,

seems to be the doctrine of the case of *Carroll* v. *The Charter Oak Insurance Company*, 38 Barb. 402."

The fact is, there are here two separate and independent things: 1. The application for permit for future residence, which, for the purposes of argument only, we may assume ripened into the equivalent of a permit actually given. 2. The fact that the contract had already ceased to exist by the death of the insured in breach of it. The second element *was in fact not included* in the intention or contemplation of the parties when they acted with reference to the former, and any *implication* that it was so is *untrue in fact*. The fact was not known to the parties. Intentions are not to be foisted upon people *in the very teeth of the actual truth*, at least unless one party has so acted as to beget an estoppel. That is impossible here, and is precluded by the nature of the case. No word or act of the defendant induced Benecke to violate his contract and throw himself into that furnace of fate in October, 1878. His immediate death there through that violation of contract extinguished the contract, and fixed the relations of parties, *before any proposition for permit for future residence was made or thought of*. That death was not known when the proposition was made. Neither the payment and receipt of the twenty dollars, nor any other possible conduct of the parties in reference to the permit applied for, could do no more than put the parties in the same situation they would have been in if the permit had been given when the twenty dollars was paid. In such case, that is to say, if an actual permit had been given, the previous death being unknown, the transaction would have been simply ineffectual. It could contain no element of consideration or estoppel to be applied

to matters unknown, but already passed and done. For this reason the authorities are uniform that *there can be no waiver after the death of the insured.*

In the case of *Tarleton* v. *Staniforth, et al.*, 5 T. R., 695, a margin of fifteen days' time was given for payment of premiums. During this period of fifteen days the *insured died.* The plaintiffs claimed that as the extended time had not expired they could still pay the premium within that time, although after the death. But it was held otherwise.

In *Pritchard* v. *Ins. Co.*, 91 E. C. L. 622, the same ruling was made. During the extended period the insured died, and the company, in ignorance by both parties of the fact, accepted payment of the premium. It was held that the contract of insurance was for a payment on a *future event of death;* that a payment of premium, the party being dead, was ineffectual, and that in the payment there was an implied understanding that the assured was then alive.

WILLIAMS, J., said:

"I cannot entertain a doubt that the premium was paid and accepted upon an implied understanding on both sides, that the party insured was then alive. Both parties were laboring under a mistake, and consequently the transaction was *altogether void.*"

In *Mut. Benefit Life Ins Co.* v. *Ruse*, 8 Ga. 545, the court, citing these cases and others, said:

"If a tender of the premium had been made in this case, beyond the day of payment named in the policy and before the expiration of the thirty days, the insured being in life, I should incline to the opinion they would have been bound by it; but if made within the thirty days, the insured being dead, and the fact of his death known to the parties, there would be, in that event, no contract—no consideration for the insurance—no mutuality. It would be

an act of mere fatuity, out of which no liability could spring. And if the fact of the death of the insured is known to the insured, and its knowledge withheld from the insurers, and they accept the premium, the contract would be void for fraud. If known to neither party, it would equally be a void contract. *There can be no valid contract for the insurance of the life of a dead man.* See, in accordance with the decision in 5 T. R. S. C., 1 B. & P., 471, Anstruther, 707. *1 Phil. Ins.*, 30 *to* 34. *Douglas* 12, *Note* 4. I do not find any authority in conflict with *Tarleton et al.* v. *Staniforth et al.*"

When Ansley learned the death of Benecke, he took moneys of the company and immediately made a tender and offer to return the $20 he had received. But we deny that the company sustained any legal duty whatever to tender back this $20 at all. When this $20 was paid, the *subject matter of the proposed contract*, namely, the life of Benecke, had ceased to be in existence. Without the knowledge of the parties at that time, his previous death in violation of his contract had put an end to the contract, and its subject-matter was gone. There was nothing under the policy for the company to do. It had nothing to pay to Benecke, and it had nothing to demand of him. The contract was at an end and there was nothing to be done. There were no mutual and dependent obligations which linked the return of this money and the breach of the contract. The contract was broken absolutely. Nothing but express contract, intelligently made, could restore it; nor even that, for "*there can be no valid contract for the insurance of the life of a dead man.*" The return of the money was not a condition precedent to anything demanded of Benecke, nor to the termination of the contract. That had already been

terminated before the company's so-called agent received the money, and the receipt of that money did not revive it. The revival of an extinguished contract, the subject-matter of which has ceased to exist, must be the matter of express new contract, and it was not in the contemplation and intent of the parties when the permit was applied for. The company had no doubt received $20 under a mistake of fact, which the party who paid it under the same mistake had a right to demand back and to recover. *But the company was under no obligation to tender it as a precedent condition of extinguishing the policy contract.* That was at an end before.

The contract for future and extra risk, if by laches the company must be held to it, was utterly void and ineffectual, because Benecke was already dead. It could not revive the old contract of insurance which was not only already broken, but the party dead. We insist, therefore, that no tender whatever was necessary in law of this $20 by the company; and it seems to us that the lines are pretty stiffly drawn when the court cannot see in the act of Ansley, tendering back the $20 out of moneys of the defendant, an act of the company, but can see that his writing for a permit which he had no power to grant, was *such* an act of the company as is claimed in this case; and can find in what transpired here an *intention* on the part of the insurance company to waive the fact utterly unknown, that one of its insured had wantonly flung himself into the fury of that pestilence and had died in breach of his contract, and that it intended to agree, for $20, to pay more than $2,100 *instanter*. That is precisely what is denominated in *Mut. Benefit* v. *Ruse, supra*, "an act of mere *fatuity* out of which no liability could spring."

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for Defendant